

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1931

No. 5541 **100**

JERRY MAIATICO, APPELLANT,

vs.

MORTGAGE SECURITY CORPORATION OF AMERICA, SUCCESSORS TO MORTGAGE BOND AND GUARANTY CORPORATION; HARRY A. KITE, TRUSTEE; FRANK J. HUGHES, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 4, 1931.

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Court of Appeals of the District of Columbia

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MORTGAGE SECURITY CORPORATION OF AMERICA, SUCCESSORS TO MORTGAGE BOND AND GUARANTY CORPORATION; HARRY A. KITE, TRUSTEE; FRANK J. HUGHES, TRUSTEE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	<i>a</i>	1
Amended bill of complaint.....	1	1
Exhibit A.....	9	9
Exhibit B.....	12	14
Fiat of Bailey, justice.....	14	15
Temporary restraining order.....	14	15
Injunction undertaking.....	16	17
Motion to dismiss amended bill of complaint.....	17	17
Order dismissing amended bill of complaint; appeal noted, &c.	18	18
Temporary injunction.....	19	19
Order vacating decree, etc.....	21	21
Answer of defendant Mortgage Security Corporation of America to the amended bill of complaint.....	21	21
Answer of Harry A. Kite and Frank J. Hughes, trustees....	32	30
Motion to increase security.....	34	32
Order increasing security for temporary injunction.....	35	32
Injunction undertaking.....	36	34
Petition for receiver, &c.....	37	34

	Original	Print
Answer to petition of defendant.....	41	37
Exhibit A.....	44	39
Exhibit B.....	44	40
Order	45	40
Findings of fact.....	46	41
Conclusions of law.....	51	45
Final decree.....	54	47
Appeal noted by plaintiff; supersedeas bond fixed at \$24,000 or \$100 cost bond.....	56	49
Memorandum: Supersedeas undertaking for \$24,000 ap- proved and filed.....	56	49
Amended assignment of errors.....	56	49
Memoranda: Statement of evidence (in duplicate) filed; statement of evidence (in duplicate) signed and filed....	58	50
Designation of record.....	58	50
Clerk's certificate.....	60	52
Statement of evidence.....	61	52
Testimony of Jerry Maiatico.....	61	53
James Byron Brooks.....	67	59
George E. Cox.....	68	60
George P. Lemm.....	68	60
Fernand Petit.....	70	61
Vernon G. Owen.....	73	64
Louis Ottenberg.....	74	65
Jerry Maiatico.....	75	66

Court of Appeals of the District of Columbia

No. 5541.

JERRY MAIATICO, Appellant,

vs.

MORTGAGE SECURITY CORPORATION OF AMERICA, Successors,
&c., et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 48557.

JERRY MAIATICO, Plaintiff,

vs.

MORTGAGE SECURITY CORPORATION OF AMERICA, Successors
to Mortgage Bond and Guaranty Corporation; Harry A.
Kite, Trustee; Frank J. Hughes, Trustee, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the
District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following
papers were filed and proceedings had, in the above-en-
titled cause, to wit:

1 *Amended Bill of Complaint.*

Filed July 9, 1928.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

No. 48557. Equity.

JERRY MAIATICO, Plaintiff,

vs.

MORTGAGE SECURITY CORPORATION OF AMERICA, Successors
to Mortgage Bond and Guaranty Corporation; Harry A.
Kite, Trustee; Frank J. Hughes, Trustee, Defendants.

First. The plaintiff, Jerry Maiatico, states that he is a citizen of the United States, and a resident of the City of Washington, District of Columbia, and alleges:

Second. Upon information and belief, that the Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, is a corporation doing business in the City of Washington, District of Columbia. This plaintiff, is not informed as to the citizenship of this corporation.

Third. Upon information and belief, that Harry A. Kite, is a citizen of the United States, and a resident of the City of Washington, District of Columbia.

Fourth. Upon information and belief, that Frank J. Hughes, is a citizen of the United States, and a resident of the City of Washington, District of Columbia.

Fifth. Harry A. Bramow, was the owner in fee simple, on to wit the first day of December, 1926, of the following described property:

2 "All of lot 22 and parts of lots 20 and 21 in Block
"47 in Mary A. Holmead and others' subdivision of
"land now known as 'Holmead Manor' as per plat re-
"corded in the Liber Governor Shepherd folios 166 and
"167 of the Records of the office of the Surveyor of the
"District of Columbia; said parts of lots 20 and 21 being
"described by metes and bounds as follows:

"Beginning for the same at the most northeasterly cor-
"ner of said lot 21; and running thence westerly on the
"southerly line of Monroe Street 16.42 feet to the point of
"intersection of said Southerly line of the said Monroe
"Street with the East line of Eleventh Street as extended
"by condemnation proceedings in District Court Case No.
"556 of the Supreme Court of the District of Columbia;
"thence south on the said East line of Eleventh Street ex-
"tended 154.10 feet to the point where the said East Line
"of Eleventh Street intersects the Southerly line of lot 20.
"Thence Easterly on the southerly line of the said lots 20
"and 21, 52.52 feet to the Easterly line of the said lot 2;
"Thence Northerly along the said Easterly line of the said
"lot 21, 150 feet to the place of begining."

"Subject to the covenants that when a building is erected
"on the said land it shall not be within 10 feet of the front
"or street line and shall not cost less than \$2000."

That while the said Harry A. Bramow, was the owner of the above described property, the Mortgage Bond and Guaranty Corporation, agreed to loan the amount of One Hundred and Ten Thousand Dollars, \$110,000, interest at the rate of 6½ per centum per annum, the said loan to be for a period of five years. The amount of \$110,000 payable as the building progressed toward completion.

Sixth. That on to wit the ninth day of December 1926, Harry A. Bramow, to further secure the Mortgage Bond and Guaranty Corporation, and before any money was paid by the Mortgage Bond and Guaranty Corporation, made and executed a deed of trust for the sum of One Hundred and Ten Thousand Dollars, \$110,000.00, represented by promissory notes in a series of 1 to 105, to the defendants, Harry A. Kite and Frank J. Hughes, Trustees for the Mortgage Bond and Guaranty Corporation, which deed of trust was recorded in the Office of the Recorder of Deeds

for the City of Washington, District of Columbia, on
3 to wit the 10th day of December 1926, in Liber 5892, Folio 302, at 2:56 P. M. a copy of said deed of trust is attached hereto and marked Exhibit "A", and it is prayed that the said deed of trust be considered part of this Bill of Complaint.

Seventh. That to wit, on the first day of December 1926, Harry A. Bramow, executed a bond to save the Mortgage Bond And Guaranty Corporation, harmless, in the erection of the proposed building as per plans and specifications, on the above described land. The plaintiff, Jerry Maiatico, was one of the guarantors, and one of the subcontractors on the said job. Subsequent to the execution of the deed of trust dated the ninth day of December 1926, and notes in a series of 1 to 105; and the bond to save the Mortgage Bond and Guaranty Corporation, harmless, Harry A. Bramow, entered upon the construction of the said building, and continued in the said work up to the sixth day of January 1927, when a payment of \$5,500.00, was made to Harry A. Bramow, by the Mortgage Bond and Guaranty Corporation, and after which date, the sixth day of January 1927, and the aforesaid payment of \$5,500.00; Harry A. Bramow, stopped work and advised this plaintiff, Jerry Maiatico, that he, (Harry A. Bramow), no longer could continue with the erection of the proposed building, and as he, (Jerry Maiatico) was on the

bond, Harry A. Bramow, requested this plaintiff, to complete the proposed building, so as to avoid any losses which would result from his, (Harry A. Bramow) failure to continue. Whereupon, a deed under date of the 17th day of January 1927, was executed by Harry A. Bramow, and Sadye Bramow, his wife, conveying the said property to this plaintiff, Jerry Maiatico, the deed is marked Exhibit "B"

and attached hereto, and it is prayed that the deed be considered part of this bill of complaint. The Mortgage Bond and Guaranty Corporation was advised that all future payments were to be made to Jerry Maiatico.

Eighth. This plaintiff, Jerry Maiatico, after the assignment entered upon and finished the erection of the proposed building. Payments by the Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, follows, and the dates on which made:

January 6, 1927.....	\$5,500.00	paid to Harry A. Bramow.
January 20, 1927.....	10,010.00	received by Jerry Maiatico.
February 1, 1927.....	10,340.00	" " "
February 9, 1927.....	10,340.00	" " "
March 1, 1927.....	11,510.00	" " "
March 16, 1927.....	10,340.00	" " "
April 4, 1927.....	10,340.00	" " "
April 19, 1927.....	10,340.00	" " "
June 6, 1927.....	20,000.00	" " "
Total	\$98,720.00	

That the full amount of \$110,000.00, was not advanced, \$98,720.00, only, as is shown on the above schedule was advanced. This plaintiff, has demanded the balance due, between the amount of \$98,720.00, and the amount of \$110,000.00, the amount claimed by the Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, which demand was refused by the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, stating that part of the amount not paid represents "Discount." That the amount retained by the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, is without the consent or the authorization of this plaintiff, Jerry Maiatico, and the retention of the amount by the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, claimed to be "Discount" is

unlawful and illegal, and in violation of the Code of Laws for the District of Columbia.

5 Ninth. That the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, knowing that the full amount of \$110,000.00, was not advanced, wrongfully demanded interest at the rate of $6\frac{1}{2}\%$ on the amount of \$110,000.00, or the amount of \$7,150.00, which was paid, whereas interest on the amount of \$98,720.00, at $6\frac{1}{2}\%$ per annum is due and payable, or the amount of \$5,051.15. The correct amount of interest due and payable from the date of advances, follows:

1 year & 10 months only

Amount.	Date loaned.	Yearly inter- est at 6½%.	Yearly inter- est at 8%.	Days money used.	Daily rate at 6½%.	Amount	Daily rate at 8%.	Amount.
\$5,500	1/ 6/27	\$357.50	\$440.00	360	\$.979	\$353.44	\$1.205	\$433.94
10,010	1/20/27	650.65	800.80	346	1.782	616.57	2.193	758.17
10,340	2/ 1/27	672.10	827.20	334	1.841	614.80	2.265	756.14
10,340	2/ 9/27	672.10	827.20	326	1.841	600.16	2.265	739.19
11,510	3/ 1/27	748.15	920.80	306	2.046	626.08	2.522	771.73
10,340	3/16/27	672.10	827.20	291	1.841	535.94	2.265	659.12
10,340	4/14/27	672.10	827.20	262	1.841	482.58	2.265	593.42
10,340	4/19/27	672.10	827.20	257	1.841	473.38	2.265	582.12
20,000	6/ 6/27	1,300.00	1,600.00	210	3.561	748.20	4.381	921.10
<u>\$98,720</u>		<u>\$6,416.80</u>	<u>\$7,897.60</u>			<u>\$5,051.15</u>		<u>\$6,215.13</u>
Interest payments made to defendant, 6/ 8/27								\$3,575.00
" " " " 12/16/27								3,575.00
Total								<u>\$7,150.00</u>
Correct amount of interest								5,051.15
Overpayment								<u>\$2,098.85</u>

It is prayed that the amount of interest overpaid be credited to the interest due the defendant Mortgage Security Corporation Successors to Mortgage Bond and Guaranty Corporation, and this plaintiff, hereby tenders and agrees to pay the balance of the interest due and payable, of \$1,109.55.

Tenth. That the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, alleges that the full sum of \$110,000.00, is the amount of the debt, and that interest is due on the alleged amount of \$110,000.00, at six and one-half per centum per annum. This plaintiff, Jerry Maiatico, unless relief
6 prayed herein is granted, will be compelled to pay interest at the rate of $6\frac{1}{2}\%$ per annum on the amount of \$110,000.00, which amount was never advanced.

Eleventh. That the amount retained as "Discount" and the amount of \$7,150.00, interest payments for the year 1927, on the alleged amount of \$110,000.00, is usurious and in violation of the Code of Laws for the District of Columbia, this plaintiff, agrees to repay the said amount actually advanced, after the crediting of the amount withheld by the Mortgage Security Corporation of America Successors to the Mortgage Bond and Guaranty Corporation, as "Discount" and the forfeiture of the amount of \$7,150.00, interest as is provided by the Code of Laws for the District of Columbia, and the amount not actually advanced, and the said "Discount" and interest and the amount not actually advanced be deemed and taken to be payments made on account of the principal debt of One Hundred and Ten Thousand Dollars (\$110,000.00) and after crediting the said amounts this plaintiff, agrees to repay the balance ascertained to be due the defendant. That the plaintiff have a personal decree against the defendant, Mortgage Security Corporation of America Successors to Mortgage Bond and Guaranty Corporation, for the amount not advanced between the amount of \$110,000.00, claimed to be the amount of the debt, and the amount of \$98,720.00, actually advanced, and for the amount of \$7,150.00, interest paid to the Mortgage Security Corporation of America Successors to Mortgage Bond and Guaranty Corporation. The defendants have wrongfully advertised the aforesaid property for sale, said sale to be held on the 9th day of July 1928, for that the amount of interest claimed is not due and payable.

Wherefore, the premises considered, the plaintiff prays:

One. That process may issue against the defendants and each of them commanding their appearance herein
7 and answer to this Bill of Complaint.

Two. That if the defendants hereto respectively shall not file answers or in answering should fail to state

fully the matters and things relevant to the plaintiff's right herein concerning which the plaintiff is without full information, that the plaintiff may have *discovery* of the defendants, and the defendants be required to answer such interrogatories as may be filed herein:

Three. Declaring the said loan secured by the defendants deed of trust, be and is, usurious and the payments not made, the amount claimed as discount, and the interest paid be credited to the debt, as provided by the Code of Laws for the District of Columbia.

Four. That said notes given to secure the deed of trust, be delivered up to the plaintiff and canceled and declared null and void.

Five. That the amount justly and lawfully due from the plaintiff to the defendant, under the aforesaid deed of trust, which is a lien upon the property, described in this bill of complaint, may be ascertained by this Honorable Court, and to this end that all necessary inquiries be made and accounts stated under its direction.

Six. That pending the determination of this suit, a temporary restraining order, and thereafter a temporary and permanent injunction issue, directed to the defendants, their agents and servants, to be enjoined from disposing of the said notes, and from taking proceedings to foreclose, or to collect or enforce said loan, or to realize upon the property covered by said deed of trust, or from in any way interfering with the property of this plaintiff, mentioned in said deed of trust.

8 Seven. That the plaintiff may have a personal decree for the payment of money against the Mortgage Security Corporation of America Successors to Mortgage Bond and Guaranty Corporation, in the amount of money found to be usurious payment and have execution thereof as at law.

Eight. That the excess interest paid be credited to the amount justly due the defendants.

Nine. That this plaintiff may have such other and further relief or decree in the matter as to this Court may seem just and proper.

JERRY MAIATICO,
Plaintiff.

ALFRED CERCEO,
PAUL A. SEBASTIAN,
Attorneys for Plaintiff.

WASHINGTON, D. C., ss:

Jerry Maiatico, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing Bill of Complaint, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JERRY MAIATICO.

Subscribed and sworn to before me this 9 day of July, A. D. 1928.

FRANK E. CUNNINGHAM,

Clerk,

By HARRY M. HULL,

Ass't Clerk.

9

EXHIBIT A.

Trust. No. 172.

Harry A. Bramow

to

Kite & Hughes, Trus.

Recorded Dec. 10, 1926, at 2:56 P. M.

This deed of trust made this 9th day of December, in the year nineteen hundred and twenty-six by and between Harry A. Bramow, and Sadye Bramow, his wife of the District of Columbia, parties hereto of the first part; and Harry A. Kite and Frank J. Hughes, of the said District, parties hereto of the second part.

Whereas the said Harry A. Bramow is justly indebted unto the Mortgage Bond and Guaranty Corporation, in the full sum of One Hundred and Ten Thousand Dollars (\$110,000) for money loaned, for which he has executed and delivered his one hundred and five certain promissory notes, bearing even date with these presents, numbered 1 to 105, respectively, notes Nos. 1 to 5 inclusive for the sum of Five Thousand Dollars \$5000 each, notes Nos. 6 to 15 inclusive for the sum of \$2500 each, notes Nos. 16 to 55 both inclusive for the sum of One Thousand Dollars \$1000

each, notes Nos. 56 to 85 both inclusive for the sum of Five Hundred Dollars \$500 each and notes Nos. 86 to 105 both inclusive, for the sum of Two Hundred and fifty dollars \$250 each; all of said notes payable to the order of the said Mortgage Bond and Guaranty Corporation, five years after date, with interest thereon from date hereof and until paid, at the rate of six and one-half per centum per annum, payable semi-annually; each instalment of interest to bear interest after maturity, if not then paid at the rate aforesaid.

And whereas, the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon, as well as any and all renewals or extensions of said notes or any part thereof, with interest on such renewals or extensions, at such rate of interest as may be agreed upon, and any notes given for interest covering any extensions of the debt or any part thereof, shall not impair in any manner the validity of, or priority of this trust; and also to secure the reimbursement to the holder or holders of said notes and to the parties hereto of the second part, or the survivor or his heirs or substituted trustee, and any purchaser or purchasers, grantee or grantees under any sale or sales under the provisions for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for,

Now, therefore this deed of trust Witnesseth, that the parties hereto of the first part, in consideration of the premises, and of one dollar in lawful money, do grant, bargain and sell, and convey unto the parties hereto of the second part in fee simple, the following described
10 land and premises, with the improvements, easements, rights ways and appurtenances thereunto belonging, situate and lying in the County of Washington, District of Columbia, namely:

All of lot 22 and parts of lots 20 and 21 in Block 47 in Mary A. Holmead and others' subdivisions of land now known as 'Holmead Manor' as per plat recorded in the Liber Governor Shepherd folios 166 and 167 of the Records of the Office of the Surveyor of the District of Columbia;

said parts of lots 20 and 21 being described by metes and bounds as follows:

Beginning for the same at the most northeasterly corner of said lot 21; and running thence westerly on the southerly line of Monroe Street 16.42 feet to the point of intersection of said southerly line of the said Monroe Street with the East line of Eleventh Street as extended by condemnation proceedings in the District Court Case No. 556 of the Supreme Court of the District of Columbia; thence south on said East line of Eleventh Street extended 154.10 feet to the point where the said East Line of Eleventh Street intersects the Southerly line of lot 20; Thence Easterly on the Southerly line of the said lots 20 and 21, 52.52 feet to the Easterly line of the said lot 21; Thence northerly along the said Easterly line of the said lot 21, 150 feet to the place of beginning.

Subject to the covenants that when a building is erected on the said land it shall not be within 10 feet of the front or street line and shall not cost less than \$2000.00.

To have and to hold the said described land and premises unto and to the only use of the said parties hereto in fee simple;

In and upon the Uses and Trusts following, that is to say:

First. Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said Harry A. Bramow, his heirs and assigns to possess and enjoy said described premises, and the issues and profits thereof; and on full payment of said notes, and of any extensions or renewal thereof and the interest thereon, and all sums advanced or expended in respect to this trust (including costs of advertising and such commissions as may be allowed by law and are not otherwise herein provided for), to release and re-convey in fee unto and at the cost of the said Harry A. Bramow, or the party or parties then claiming under him, the aforesaid land and premises.

Second. Upon any default being made in the payment of any one of said notes or any instalment of principal or interest thereon, or on any renewal or extension thereof, or of any note or notes hereafter given for interest covering any extension, with the interest thereon from maturity of the same, when and as the same shall become due and pay-

able; or upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises, or any part thereof, while this trust exists a fire insurance on the buildings on said land in amount, in the name and to the satisfaction of the parties hereto of the second part, who may select and designate the company or companies in
11 which such insurance shall be placed, and who shall apply whatever may be received therefrom to the payment of the matters hereby secured, whether then due or not, unless the party entitled to receive shall waive the right to have the same so applied, or upon any default in payment or demand of any sum or sums advanced by the holder or holders of said notes on account of any costs and expenses of this trust, or on account of any such tax or assessment, or insurance, or expenses of litigation, without interest thereon at 6% from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax or assessment, or insurance, or expense of litigation aforesaid, the same may be paid by the holder or holders of said notes and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said parties hereto of the second part, or the survivor or his heirs or substituted trustee shall sell the aforesaid land and premises and improvements at public auction, at such time and place, upon such terms and conditions and after such previous public notice, with such postponement of sale or resale, as to the said parties hereto of the second part, or the survivor or his heirs or substituted trustee, shall seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee simple to, and at the cost of the purchaser, the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments or insurance, or expense of litigation as aforesaid, with interest as aforesaid and a trustees commission of five per centum on the gross amount of sales) to the payment of the aforesaid indebtedness, or so much thereof as may then remain unpaid, whether due or not, and the interest thereon to date of

payment (it being agreed that the said notes shall upon such sale being made before the maturity of said notes, or before the maturity of any renewal or extension thereof, be and become immediately due and payable, at the election of holder thereof) pay over the surplus, if any, to the said Harry A. Bramow, his heirs or assigns upon the surrender and delivery to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

And the said Harry A. Bramow, does Hereby covenant that he will warrant specially the property hereby conveyed, and that he will execute such further assurance of said land as may be requisite, for vesting title in the said parties hereto of the second part, for the uses and purposes, and upon the trusts hereinbefore declared, and will pay the aforesaid taxes and assessments and fire insurance premiums as the same become due and payable during the existence of this trust, and while he is the owner of said land and premises.

In testimony whereof, on the day and year first herein above written, the said parties hereto of the first part have hereunto set their hands and seals.

HARRY A. BRAMOW. [SEAL.]
SADYE BRAMOW. [SEAL.]

Signed, sealed, delivered in the presence of—
———

12 DISTRICT OF COLUMBIA, *To wit:*

I, Harry S. Welch, Jr., a notary public in and for the aforesaid District do certify that Harry A. Bramow, and Sadye Bramow, his wife, the grantors in, and who are personally well known to me to be the persons who executed the foregoing and annexed deed bearing the date of Dec. 9th, A. D. 1926, personally appeared before me in the aforesaid District and acknowledged the said deed to be their act and deed.

Given under my hand and official seal this 9th day of Dec. A. D. 1926.

[NOTARIAL SEAL.]

HARRY S. WELCH, JR.,
Notary Public, D. C.

EXHIBIT B.

This deed, made this 17th day of January, in the year of one thousand nine hundred and Twenty-seven, by and between Harry A. Bramow and Sadye Bramow, his wife, of the District of Columbia, parties of the first part, and Jerry Maiatico, of the same place, party of the second part:

Witnesseth, That in consideration of Ten and 00/100 Dollars, the parties of the first part do hereby grant unto the party of the second part, in fee simple, all that piece or parcel of land, together with the improvements, rights, privileges, and appurtenances to the same belonging, situate in the County of Washington, District of Columbia, described as follows, to wit: All of Lot 22 and parts of lots 20 and 21 in Block 47 in Mary A. Holmead and others' subdivision of land now known as "Holmead Manor" as per plat recorded in the Liber Governor Shepherd folios 166 and 167 of the Records of the Office of the Surveyor of the District of Columbia; said parts of lots 20 and 21

being described by metes and bounds as follows:

13 Beginning for the same at the most Northeasterly corner of said lot 21; and running thence westerly on the southerly line of Monroe Street 16.42 feet to the point of intersection of the said southerly line of the said Monroe Street with the East line of Eleventh Street as extended by condemnation proceedings in District Court Case No. 556 of the Supreme Court of the District of Columbia; thence South on the said East line of Eleventh Street extended 154.10 feet to the point where the said East line of Eleventh Street intersects the Southerly line of lot 20; thence Easterly on the Southerly line of the said lots 20 and 21, 52.52 feet to the Easterly line of the said Lot 21; thence Northerly along the said Easterly line of the said Lot 21, 150 feet to the place of beginning;

Subject to the covenants that when a building is erected on the said land it shall not be within 10 feet of the front or street line and shall not cost less than \$2000.

NOTE.—At the date hereof, the above described land is designated on the Books of the Assessor of the District of Columbia, for taxation purposes, as Lot- 804, 805, 806, and 807 in square 2840.

Subject however to the first and second Deeds of Trust of record, which the party of the second part assumes and agrees to pay.

And the said parties of the first part covenants that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

Witness their hands and seals the day and year hereinbefore written.

HARRY A. BRAMOW. [SEAL.]
SADYE BRAMOW. [SEAL.]

In presence of—
LEO V. GLORIUS.

14 *Fiat of Justice Bailey.*

Let this amended bill of complaint be filed.

JENNINGS BAILEY,
Justice.

Temporary Restraining Order.

Filed July 9, 1928.

* * * * *

Upon consideration of the verified original and amended bills of complaint in the above entitled cause, wherein it is alleged that the said bills were filed on the 6th and 9th days of July 1928, respectively, and that the sale mentioned in the said cause is scheduled to take place on the 9th day of July 1928, that the plaintiff, Jerry Maiatico, is the assignee of Harry A. Bramow, the maker of the deed of trust for \$110,000, under which a foreclosure sale is sought; that the maker of the deed of trust, Harry A. Bramow or any one else never received the full amount of \$110,000.00, under the said deed of trust, that the amount of \$98,720.00, only was advanced, and that interest is due and payable on the amount advanced, and not the amount claimed to be advanced under the deed of trust of \$110,000.00, that the interest claimed on the loan exceeds the legal rate allowed by law; that the property was conveyed to the plaintiff, Jerry Maiatico, by Harry A. Bramow, under date of January 17, 1927, and Jerry Maia-

tico, is now the owner, and that irreparable loss will be sustained by the plaintiff, should the sale be carried into effect, it is this 9th day of July 1928,

15 Ordered, that the defendants and each of them be and they are hereby restrained from making or carrying into effect the sale of the following described premises; at public auction; by reason of the alleged default:

All of lot 22 and parts of lots 20 and 21 in Block 47 in Mary A. Holmead and others' subdivision of land now known as "Holmead Manor," as per plat recorded in the Liber of Governor Shepherd folios 166 and 167 of the Records of the office of the Surveyor of the District of Columbia; said parts of lots 20 and 21 being described by metes and bounds as follows:

Beginning for the same at the most northeasterly corner of said lot 21; and running thence westerly on the southerly line of Monroe St. 16.42 feet to the point of intersection of said southerly line of the said Monroe Street with the East line of Eleventh Street as extended by condemnation proceedings in the District Court Case No. 556 of the Supreme Court of the District of Columbia; thence south on the said East line of Eleventh Street extended 154.10 feet to the point where the said East Line of Eleventh Street intersects the southerly line of lot 20. Thence Easterly on the Southerly — of the said lots 20 and 21, 52.52 feet to the easterly line of the said lot 20, thence northerly along the said Easterly line of said lot 21, 150 feet to the place of beginning. Subject to the covenants that when a building is erected on the said land it shall not be within 10 feet of the front or street line and shall not cost less than \$2000.

said restraining order to expire on the 18th day of July 1928, at the hour of 10 A. M. unless further continued by order of this Court, it is further

Ordered, that this restraining order shall go into effect upon the plaintiff giving an undertaking in the sum of \$10,000.00, conditioned according to law, with surety to be approved by the Court.

The above order is signed and issued this 9th day of July 1928 at 1:40 P. M.

By the Court:

JENNINGS BAILEY.

16

Injunction Undertaking.

Filed July 9, 1928.

* * * * *

Jerry Maiatico, the plaintiff, and Hartford Accident and Indemnity Company, surety submitting ourselves to the jurisdiction of the Court, hereby undertake for ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, to make good to the defendants all damages not to exceed the sum of ten thousand dollars (\$10,000) by them suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the Court shall direct, and that, on dissolving the injunction, the Court may give judgment thereon against the principal and surety for said damages in the decree dissolving the injunction, or in a further decree after ascertainment of the amount of said damages.

JERRY MAIATICO.

[SEAL.]

HARTFORD ACCIDENT AND IN-
DEMNITY CO.,

[SEAL.]

By PHILIP J. VIEHMANN,

Attorney-in-fact.

Approved July 7, 1928.

JENNINGS BAILEY,
Justice.

Surety qualified, and execution in accordance with written authority on file in this office.

FRANK E. CUNNINGHAM,

Clerk.

By M. LEE ASHFORD,

*Asst. Clerk.*17 *Motion to Dismiss Amended Bill of Complaint.*

Filed July 17, 1928.

* * * * *

Comes now the defendant, Mortgage Security Corporation of America, and moves the Court to dismiss the amended bill of complaint of the plaintiff herein, and for

reasons therefor says, that the said amended bill of complaint fails to set forth facts sufficient to constitute a cause of action in equity entitling the plaintiff to the equitable relief prayed for therein against this defendant.

LOUIS OTTENBERG,

JACOB HALPER,

*Attorneys for Defendant Mortgage
Security Corporation of America.*

Alfred Cerceo, Esq.,

Paul A. Sebastian, Esq.,

Att'ys for plaintiff:

The foregoing motion will be for hearing before the Justice holding said Court on Thursday, July 19th, 1928, at 10 o'clock, A. M., or as soon thereafter as said motion can be heard.

LOUIS OTTENBERG,

JACOB HALPER,

Attorneys for said Defendant.

Copy of above motion and notice of hearing thereof acknowledged this 17th day of July, 1928.

ALFRED CERCEO.

18 *Order Dismissing Amended Bill of Complaint, etc.*

Filed July 19, 1928.

* * * * * * *

Upon consideration of the plaintiff's amended bill of complaint; the temporary restraining order issued thereon; the motion of the defendant, Mortgage Security Corporation of America, to dismiss the said amended bill of complaint, and the matters having been argued by counsel and considered by the Court, it is now, therefore, this 19th day of July, 1928,

Adjudged, ordered and decreed, that said motion of the said defendant, be and the same is hereby granted and said amended bill of complaint be, and the same is hereby dismissed, and the temporary restraining order issued herein be and the same is hereby dissolved, provided, however, that nothing herein contained shall be construed as depriving the defendants of the right to have the damages which

they, or any of them may have suffered or sustained by reason of the wrongful and inequitable suing out of the temporary restraining order herein, hereafter ascertained as the Court may direct.

By the Court:

JENNINGS BAILEY,
Justice.

Approved as to form.

ALFRED CERCEO,
LOUIS OTTENBERG,
JACOB HALPER,
Attys. for Defts.

Appeal noted by plaintiff in open court and supersedeas bond fixed at \$20,000 thousand (\$20,000) dollars & temporary injunction to issue pending appeal.

JENNINGS BAILEY,
Justice.

19

Temporary Injunction.

. Filed July 26, 1928.

* * * * *

Upon consideration of the original and amended bills of complaint; the temporary restraining order, issued herein on the 9th day of July 1928; the motion of the defendant, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, to dismiss the amended bill of complaint; and the order dismissing the said bill of complaint, wherein it appears, "Appeal noted by the plaintiff in open court and supersedeas bond fixed at Twenty Thousand (\$20,000.00) dollars, temporary injunction to issue pending appeal," from the said order of dismissal, it is this 26th day of July 1928,

Ordered, that the temporary restraining order, issued on the 9th day of July 1928, wherein the defendants and each of them are restrained from making or carrying into effect the sale of the premises described as follows:

"All of lot 22 and parts of lots 20 and 21 in Block 47 in Mary A. Holmead and others' subdivision of land now known as 'Holmead Manor as per plat recorded in the liber

Governor Shepherd folios 166 and 167 of the Records of the office of the Surveyor of the District of Columbia; said parts of lots 20 and 21 being described by metes and bounds as follows:

“Beginning for the same at the most northeasterly corner of said lot 21 and running thence westerly on the southerly line of Monroe Street 16.42 feet to the point of intersection of said Southerly line of the said Monroe Street with the East line of Eleventh Street as extended by condemnation proceedings in District Court Case No. 556 of the Supreme Court of the District — Columbia; thence south on the said East line of Eleventh Street extended 154.10 feet to the point where the said East line of Eleventh Street intersects the southerly line of lot 20. Thence easterly on the southerly line of the said lots 20 and 21, 52.52 feet to the easterly line of the said lot 20; Thence northerly along the said Easterly line of the said lot 21, 150 feet to the place of beginning.

Subject to the covenants that when a building is erected on the said land it shall not be within 10 feet of the front or street line and shall not cost less than \$2,000,

be and it is hereby continued pending the appeal of the plaintiff from the said dismissal, to the Court of Appeals, of the District of Columbia, it is further,

Ordered, that the defendants, Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, Harry A. Kite and Frank J. Hughes, be and they are hereby restrained and enjoined during the pendency of the appeal by the plaintiff from order of dismissal of the amended bill of complaint, to the Court of Appeals, of the District of Columbia, from making or carrying into effect the foreclosure sale of the premises herein described, or in any way interfering with the possession of the said premises by the plaintiff, Jerry Maiatico.

Ordered, that this temporary injunction shall go into effect upon the plaintiff giving a supersedeas bond in the sum of \$20,000 conditioned according to law, with surety to be approved by the Court.

Ordered, that this temporary injunction shall continue in full force and effect until revoked or modified by further

order of this Court, or the Court of Appeals, of the District of Columbia, in that regard.

The above order is signed and issued this 26th day of July 1928, at — o'clock A. M.

By the Court:

PEYTON GORDON,
Justice.

21 *Order Vacating Decree, etc.*

Filed June 1, 1929.

* * * * *

Upon consideration of the mandate of the Court of Appeals of the District of Columbia filed herein on the 19th day of April, 1929, it is by the Court this 1st day of June, 1929,

Adjudged, ordered and decreed, that the decree of this Court entered herein on the 19th day of July, 1928, dismissing the plaintiff's Bill of Complaint be and the same is hereby set aside, vacated and held for naught; and it is further

Adjudged, ordered and decreed, that this cause proceed further not inconsistent with the opinion of the said Court of Appeals of the District of Columbia; and it is further

Adjudged, ordered and decreed, that the said plaintiff recover of said defendant Mortgage Security Corporation of America his costs on appeal taxed by the Clerk at \$121.45, and have execution therefor as at law; and it is further

Adjudged, ordered and decreed, that the defendants herein file answers to plaintiff's Amended Bill of Complaint on or before the 30th day of June, 1929.

JENNINGS BAILEY,
Justice.

Answer of Defendant Mortgage Security Corporation of America to the Amended Bill of Complaint.

Filed July 1, 1929.

* * * * *

The defendant, Mortgage Security Corporation of America, now and at all times hereafter saving and reserv-

ing to itself all matter of benefit and advantage of
22 exception to the many errors and uncertainties in the
amended Bill of Complaint contained, for answer
thereto, or to so much or such parts thereof as this defend-
ant is advised is material for it to answer, answering says:

1, 2, 3 and 4. This defendant admits the allegations con-
tained in paragraphs 1, 2, 3 and 4 of said amended bill of
complaint.

5. This defendant admits the allegations of paragraph 5
of said amended bill of complaint.

Further answering said paragraph 5, this defendant
says that on, to wit, the 19th day of November, 1926, said
Harry A. Bramow made an application to the Mortgage
Bond and Guaranty Corporation for a construction loan of
\$110,000, a true copy thereof being hereto attached and made
a part hereof. That it was then and there agreed between
said Mortgage Bond and Guaranty Corporation and the
said Bramow that it would be necessary for said Mortgage
Bond and Guaranty Corporation to render certain services
in connection with said construction loan, such as examina-
tion of plans, specifications and of the building site before
the commencement of the construction work, inspection of
the building operation as the work progressed, securing,
examining and, from time to time, checking up the list of
all sub-contractors engaged in and upon the work afore-
said, so as to be in a position to check accurately the final
release of liens of all contractors and sub-contractors en-
gaged upon said work, and rendering other and miscellane-
ous services in connection with the construction of said
building, and, from time to time, supervising the same. For
these services the Mortgage Bond and Guaranty Corpora-
tion was to be paid a sum equal to 6% of the loan.

23 6. This defendant admits the allegations of para-
graph 6.

7. Answering paragraph 7, this defendant denies that on
the first day of December, 1926, the said Harry A. Bramow
executed the bond mentioned in said paragraph 7, but says
that on, to wit, the 14th day of December, 1926, the said
Harry A. Bramow, as principal, and Abe Goldstein and
Jerry Maiatico, as sureties, executed a bond for the com-
pletion of the erection of the building on the land afore-
said, according to plans to be approved by the said Mort-

gage Bond and Guaranty Corporation, and such additions and alterations as may be approved by it, free from the claim of all persons supplying labor and materials entering into the construction of said building, and agreed to indemnify and save harmless the said Mortgage Bond and Guaranty Corporation from and against any loss, cost, damage or expense which may be suffered or sustained by reason of the non-completion of the building within six months from the date of said bond, and free from mechanics' liens. This defendant is informed and believes, and therefore avers, that the plaintiff was the brick contractor on said building operation. This defendant admits that subsequent to the execution of the deed of trust dated December 9, 1926, and of the notes therein described, and of the execution and delivery of the bond aforesaid, the said Harry A. Bramow entered upon the construction of said building. This defendant is without knowledge or information sufficient to form a belief as to whether or not the said Harry A. Bramow conducted the work up to the 6th day of January, 1927, or whether the said Bramow stopped work on said building after he received a payment on the 6th day of January, 1927, and therefore can neither admit nor deny, but if the same is material, requires strict proof. This defendant is in-

formed and believes, and therefore avers, that on, 24 to wit, the 6th day of January, 1927, the said Mortgage Bond and Guaranty Corporation paid to the said Bramow the sum of Fifty-five Hundred Dollars, representing the first payment "footings" on construction loan, as per schedule, and that on, to-wit, the 20th day of January, 1927, it paid to the said Bramow the sum of Eleven Thousand Dollars less the sum of Nine Hundred Ninety Dollars, representing the commission of six per cent mentioned in the application aforesaid. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that the said Bramow advised the plaintiff that he, the said Bramow, could not any longer continue with the erection of said proposed building, and that as he, the said Maiatico, was on said bond, said Bramow requested Maiatico to complete the said building, so as to avoid losses which would result from said Bramow's failure to continue, or that the deed dated January 17, 1927 was thereupon or

for that reason executed by the said Bramow and his wife, conveying the said property to the plaintiff herein. This defendant is advised and believes, and therefore avers, that on, to wit, the 25th day of January, 1927, the said Mortgage Bond and Guaranty Corporation was advised that said Bramow had conveyed said property to said Maiatico, and that the said Maiatico in and by said deed had assumed and agreed to pay the aforesaid deed of trust in the sum of \$110,000, and that said assumption and agreement to pay on the part of the said Maiatico was a part of the purchase price and one of the considerations for the execution and delivery of said deed by said Bramow to said Maiatico. This defendant is informed and believes, and therefore avers, that it was never the purpose, object or intention of said Bramow, Maiatico, or the Mortgage Bond and Guaranty Corporation to substitute said plaintiff for said Bramow after the latter had conveyed said real estate to the plaintiff, and the Mortgage Bond and Guaranty Corporation refused to make payments to plaintiff until requested by said Bramow so to do. That on, to-wit, January 25, 1927, Bramow requested of said Mortgage Bond and Guaranty Corporation that all future payments in connection with the undisbursed balance of said construction loan be made to Jerry Maiatico, subject to all of the terms and conditions of the said loan as approved and accepted by said Bramow and said Mortgage Bond and Guaranty Corporation. Plaintiff agreed to said request upon the conditions stated. At no time was the then undisbursed balance of said construction loan ever transferred or assigned to plaintiff by said Bramow, but such payments as were made to Maiatico by the Mortgage Bond and Guaranty Corporation were made at the request and for the account of said Bramow. That in so far as said Mortgage Bond and Guaranty Corporation was concerned, said Maiatico was Bramow's grantee of said real estate, to whom Bramow requested certain of his funds to be paid, and Maiatico was never, in law or in fact, substituted for Bramow in this matter, nor did plaintiff ever take the place of Bramow in connection with said transaction. Plaintiff at no time made any new contract or agreement with said Mortgage Bond and Guaranty Corporation, or with this defendant.

8. Answering paragraph 8, this defendant denies that the said Bramow ever made any assignment concerning said building or construction loan aforesaid to said Maiatico, but is informed and believes, and therefore avers, that said Maiatico did enter upon and finish the erection of said building after he had obtained title to said property. This defendant denies that the payments recited in said paragraph 8 are true and correct, but says that the following payments and disbursements were made to or for said Bramow:

January 5, 1927, Payments made.....	\$5,500.00
January 20, 1927, ".....	10,010.00
February 1, 1927, ".....	10,340.00
February 9, 1927, ".....	10,340.00
March 1, 1927, ".....	15,510.00
March 16, 1927, ".....	10,340.00
April 4, 1927, ".....	10,340.00
April 19, 1927, ".....	10,340.00
June 6, 1927, ".....	20,000.00
	\$102,720.00

In addition to the foregoing, and by direction and agreement of said Bramow, there was deducted from said loan the sum of \$6600, being compensation, by way of commission agreed upon between the said Bramow and the said Mortgage Bond and Guaranty Corporation for the services aforesaid rendered and to be rendered by the latter in connection with the erection of said apartment-house; the sum of \$70.79, being the premium on the employers' liability insurance; the sum of \$621.85, fire insurance, as required by the terms of the deed of trust aforesaid; the sum of \$15.00 for surveyor's plat; the sum of \$3.00 for photographs; making a total disbursement of \$110,030.64; that thereafter the sum of \$30.64 was paid to this defendant in adjustment of said account. This defendant denies that the plaintiff has ever demanded of it the difference between \$98,720 and the sum of \$110,000. The attention of the Court is respectfully directed to the fifth item in the alleged schedule of payments shown on the fourth page of the plaintiff's amended bill of complaint, to wit, the item of

\$11,510.00, and as to said item this defendant says that it holds a receipt for the sum of \$15,510.00 approved by the plaintiff. Defendant further says that no tender of payment of any sums, either of principal or interest, has
27 ever been made by said plaintiff to this defendant.

Further answering said paragraph 8, this defendant says that it is immaterial whether or not the plaintiff authorized or consented to the disbursements aforesaid. The said plaintiff being the vendee of the said Harry A. Bramow as aforesaid, and having assumed and agreed to pay the said deed of trust in the sum of \$110,000 as a part of the purchase price of said land and premises is in law estopped from making any collateral or other attack upon said deed of trust, and especially is estopped from claiming that said deed of trust, or any part thereof, is unlawful, illegal or usurious. This defendant denies that said deed of trust, or this defendant's action or conduct in connection therewith, or the action or conduct of the said Mortgage Bond and Guaranty Corporation, was in any manner illegal, unlawful or in violation of the Code of Law of the District of Columbia.

Further answering said paragraph 8, this defendant says, upon information and belief, that at the time of the approval by the said Mortgage Bond and Guaranty Corporation of said loan, it immediately caused to be set aside for the use and account of said Harry A. Bramow the said sum of \$110,000, and that whenever a payment was due according to schedule, it was promptly paid.

9. Answering paragraph 9, this defendant denies that the said sum of \$110,000 was not advanced, and denies that it wrongfully demanded interest at the rate of 6½% on the amount of \$110,000, and it denies that the correct amount of interest due and payable is as shown in said paragraph 9.

Further answering said paragraph, this defendant says
28 that all of said \$110,000 having been available as hereinbefore recited, it was justly and legally entitled to charge interest thereon as provided in the deed of trust securing the notes aforesaid, and this defendant says that the plaintiff is estopped from setting up or claiming the amounts and interest alleged in said paragraph 9, for the reasons hereinbefore recited.

Further answering said paragraph 9, this defendant denies that interest has been overpaid, or that the plaintiff has ever tendered or agreed to pay to this defendant any sum whatsoever, but on the contrary says that in violation of the deed of trust aforesaid, the plaintiff, as the present owner of record of the property aforesaid, had failed to pay the taxes due on the said property, and had failed to pay the interest due under said deed of trust; that the said plaintiff being in default as aforesaid, this defendant had a full legal right to authorize and direct the Trustees named in said deed of trust to foreclose in accordance with the terms and provisions of said deed of trust.

10. Answering paragraph 10, this defendant admits the allegations of said paragraph 10, except that it denies that the said sum of \$110,000 was not advanced, and furthermore it denies the right of the plaintiff to the relief prayed for.

11. Answering paragraph 11, this defendant denies each and every allegation thereof, for the reasons hereinbefore recited.

Further answering said paragraph 11, this defendant says that it was justly and legally entitled to advertise and sell said property at public auction, under the terms and provisions of said deed of trust, and that it advertised the same, the sale to have been held on the 9th day of July, 1928, and but for the wrongful and inequitable issuing of the temporary restraining order herein, said defendant

29 would have sold said property. That as a result of the wrongful issuing of said temporary restraining order, it became necessary for this defendant to withdraw said sale, whereupon the said Trustees became and were lawfully entitled to receive compensation at the rate of one per cent of the full amount of said deed of trust, to wit, the sum of \$1100. That by reason of the wrongful issuing of said temporary restraining order and preliminary injunction, and also under the terms and provisions of said deed of trust, this defendant is entitled to recover from the plaintiff, in addition to the compensation to the Trustees, reasonable counsel fees to its counsel, which it has incurred or paid on account of the litigation arising in respect to this trust, together with \$100.30 because of the advertisement aforesaid, \$15.00 expense to the auctioneer, besides interest and penalty on the unpaid taxes, if any,

which have accrued since the issuance of said temporary restraining order.

Wherefore, this defendant, having fully answered, prays that the temporary restraining order and preliminary injunction may be dissolved; that the plaintiff's bill of complaint may be dismissed, and that this defendant may have and recover of the said plaintiff and the sureties on the undertakings filed in this cause all damages, not exceeding the sum of \$10,000, by this defendant suffered or sustained by reason of said wrongful and inequitable suing out of the said temporary restraining order and preliminary injunction; and this defendant prays that the damages may be ascertained in such manner as the Court may direct, and that it may have judgment thereon against said plaintiff and said sureties for said damages in the decree dissolving said temporary restraining order and preliminary injunction, or in a further decree after the ascertainment of
30 the amount of said damages.

MORTGAGE SECURITY CORPO-
RATION OF AMERICA,

By J. A. MARKEL,
President.

LOUIS OTTENBERG,
JACOB HALPER,

*Attorneys for Defendant Mortgage
Security Corporation of America.*

CITY OF NEW YORK,
State of New York, ss:

Personally appeared J. A. Markel, who, being first duly sworn, on oath says that he is the President of the defendant Mortgage Security Corporation of America; that he is authorized to sign the foregoing answer and make this verification for and on behalf of said Corporation; that the matters and things in said answer stated as upon personal knowledge are true, and those stated upon information and belief, he believes to be true.

J. A. MARKEL.

Subscribed and sworn to before me this 28 day of June,
1929.

[NOTARIAL SEAL.]

WM. M. WEAVER,
Notary Public for New York County, No. 60.

Certificate filed in Kings No. 120, Nassau, Queens No. 31.
 Bronx No. 2, Richmond and Westchester Counties.
 New York County Register's Office No. O-9.
 Kings County Register's Office No. 102.
 Bronx County Register's Office No. 3001.
 My Commission Expires March 30, 1930.
 Foreign Commr. of Deeds for State of New Jersey.

31 Washington, D. C., November 19, 1926.
 Construction Loan, Mortgage, Bond & Guaranty Corpora-
 tion,
 Washington, D. C.

GENTLEMEN:

Application is hereby made for a construction loan of \$110,000.00 at 6½% interest, payable semi-annually for five years, secured by first deed of trust on the following property, title to which is good of record:

Lot 804-807, Square 2840, Premises S. E. Corner 11th & Monroe Sts., N. W.

Bldg. designed for Apt. & Stores, Families. Cost of lot, \$30,000.00.

O. K. F. P.

No. of stories: —. Size of bldg. x x Cube of bldg.: 384,795 c. f.

No. of rooms: —. No. of bathrooms: —. Garage: —. Size: x.

Apts.: — /1's; — /2's; — /3's; — /4's; — /5's; — /6's; — /7's; — /8's.

Size of cellar: X. Construction of garage: —.

Bldg. heated by H. W. H. Cost of bldg.: \$185,809. Bid estimated.

Selling price of property: \$—. Size of Lot: X. Sq. Ft. 12,663.

Gas or elec. light.: Elec.

Specifications in Brief.

Foundation? Roof? Sidewalks? Exterior Finish, Stone trim
 Fireproof Yest Floors: 1st floor? 2d floor?
 Bathrooms Floors? Wainscote?

Complete plans and specifications submitted herewith are a part of this application and will not be changed without your consent. A mutually satisfactory schedule of pay-

ments to be furnished by you, and it is agreed that ground will not be broken or work undertaken until after deed of trust is recorded. Completion bond to be signed by ———. Architect? ———. Builder? Harry A. Bramow.

Estimated Rental and Operating Expenses.

Total gross annual rent, \$24,540. Total annual operating expenses, —.

Have you arranged for release of all encumbrances? None.

Remarks.

I agree to pay all necessary expenses incidental to making said loan, including cost of preparing Certificate of Title, Tax Certificate, all title papers, conveyancing and recording of same.

I also agree that you are to write the fire insurance in the amount and for the term that you require and hold all policies.

I further agree to pay you a commission of 6% of the amount of the loan approved and if after approval, I, for any reason, fail to complete the transaction, agree to pay all expenses incurred, including the said commission.

Maker's Signature: HARRY A. BRAMOW.

Husband's or Wife's Name: SADYE BRAMOW.

Address: 726 14th St., N. W.

Telephone: Main 9394.

Survey & plat, bond for completion, accepted Dec. 6, 1926.

H. A. BRAMOW.

32 *Answer of Harry A. Kite and Frank J. Hughes, Trustees.*

Filed July 1, 1929.

* * * * *

The defendants Harry A. Kite and Frank J. Hughes, Trustees, for answer to the bill of complaint filed herein say that they are without information or knowledge sufficient to form a belief as to any of the allegations contained in said bill of complaint, except that they were named as

trustees under the certain deed of trust from Harry A. Bramow and wife, dated on, to-wit, December ninth, 1926, to secure the Mortgage Bond and Guaranty Corporation; that they were advised by the party secured that default had occurred under the provisions of said deed of trust and were instructed to proceed with foreclosure under said deed of trust. That they had advertised for sale the property described in said deed of trust, but upon issuance of the temporary restraining order herein, they withdrew said foreclosure proceedings pending the outcome of this cause. That under the terms of said deed of trust they are entitled to certain compensation, which they hereby demand of plaintiff, together with the expenses heretofore incurred in connection with the advertising of said property under said foreclosure proceedings.

Having fully answered, these defendants pray that said bill of complaint may be dismissed, and that they may have their costs in this behalf incurred.

HARRY A. KITE,
Trustee.

FRANK J. HUGHES,
Trustee.

LOUIS OTTENBERG,
Atty. for Defts.

33 DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing and annexed Answer of Harry A. Kite and Frank J. Hughes, Trustees, by me subscribed and know the contents thereof; that the statements of fact therein made as upon personal knowledge are true; and those made as upon information and belief, I believe to be true.

HARRY A. KITE.

Subscribed and sworn to before me this 28th day of June, 1929.

[NOTARIAL SEAL.]

BLANCHE T. BOWEN,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing and annexed Answer of Harry A. Kite and Frank J. Hughes, Trustees, by me subscribed and know the contents thereof;

that the statements of fact therein made as upon personal knowledge are true; and those made as upon information and belief, I believe to be true.

FRANK J. HUGHES.

Subscribed and sworn to before me this 28th day of June, 1929.

[NOTARIAL SEAL.]

BLANCHE T. BOWEN,
Notary Public, D. C.

34 *Motion to Increase Security.*

Filed July 24, 1929.

* * * * * * *

Now comes the defendant Mortgage Security Corporation of America, etc., *et al.*, and moves the court to increase the sum of the security given by the defendant upon the issuance of the temporary injunction issued herein on the 26th day of July, 1928.

LOUIS OTTENBERG,
JACOB HALPER,
Attorneys for Defendant.

Alfred Cerceo, Esq.,
Attorney for Plaintiff:

Please take notice that the above motion will be for hearing before the Justice holding said court on the 30th day of July, 1929, at 10 A. M.

LOUIS OTTENBERG,
JACOB HALPER,
Attorneys for Defendant.

Service of the above motion and notice of hearing thereof acknowledged this 24th day of July, 1929.

ALFRED CERCEO,
Attorney for Plaintiff.

35 *Order Increasing Security for Temporary Injunction.*

Filed August 14, 1929.

* * * * * * *

It appearing to the court that by an order entered herein on, to wit, the 9th day of July, 1928, plaintiff procured a tem-

porary restraining order and gave an undertaking of \$10,000.00 thereunder; that by an order entered herein on, to wit, the 19th day of July, 1928, plaintiff's amended bill of complaint was dismissed and the said temporary restraining order dissolved, from which order the plaintiff thereupon noted an appeal to the Court of Appeals of the District of Columbia, and thereupon on, to wit, the 26th day of July, 1928, by an order entered herein, said temporary restraining order was continued, pending the appeal of the plaintiff from the aforesaid order of dismissal, and a temporary injunction was granted the plaintiff upon his giving a supersedeas bond in the sum of \$20,000, and thereupon the said temporary injunction was continued in full force and effect until revoked or modified by order of this court, or of the Court of Appeals; that on, to wit, the first day of April, 1929, said Court of Appeals reversed the aforesaid order of dismissal, it is, this 14th day of August, 1929, upon consideration of the foregoing and of the motion of the defendant Mortgage Security Corporation of America to require the plaintiff to increase its security for said temporary injunction,

Ordered that the temporary injunction heretofore issued in this cause be and the same is hereby continued nunc pro tunc, upon the plaintiff giving an undertaking in the sum of Fifteen Thousand Dollars (\$15,000.00), conditioned according to law, with surety to be approved by the court.

36 And it is further ordered that upon the filing by the plaintiff and the approval by the court of the aforesaid undertaking, the surety upon the undertaking heretofore given by the plaintiff pursuant to the temporary restraining order filed herein on, to wit, the 9th day of July, 1928, shall be fully discharged and released from all liability upon and under said temporary restraining order undertaking, except for acts, defaults or commissions of error occurring prior to the approval of the undertaking to be given pursuant to this order of August 14, 1929.

PEYTON GORDON,

Justice.

No objection as to form.

LOUIS OTTENBERG,

Attorney for Defendant.

Injunction Undertaking.

Filed August 15, 1929.

* * * * *

Jerry Maiatico, the plaintiff, and New Jersey Fidelity and Plate Glass Ins. Co., surety submitting ourselves to the jurisdiction of the Court, hereby undertake for ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, to make good to the defendants all damages not to exceed the sum of Fifteen thousand dollars (\$15,000) by them suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the Court shall direct, and that, on dissolving the injunction, the Court may give judgment thereon against
 37 the principal and surety for said damages in the decree dissolving the injunction, or in a further decree after ascertainment of the amount of said damages.

JERRY MAIATICO. [SEAL.]

NEW JERSEY FIDELITY & PLATE
GLASS INS. CO. [SEAL.]GEORGE H. PRICE,
Attorney-in-Fact.

Approved August 15th, 1929.

PEYTON GORDON,
Justice.

Surety qualified and execution in accordance with written authority on file in this office.

FRANK E. CUNNINGHAM,
*Clerk,*By BUHRMAN,
*Asst. Clerk.**Petition for Receiver, etc.*

Filed April 24, 1930.

* * * * *

The petition of the Mortgage Security Corporation of America respectfully shows to this Honorable Court:

1. That it is a defendant in the above entitled cause and is the holder and owner of the certain promissory

notes aggregating \$110,000.00 made by Harry A. Bramow and secured by a first deed of trust on the certain apartment house at the corner of Eleventh & Monroe Streets, Northwest, situated on the lot designated for the purposes of taxation and assessment as Lot 820, in Square 2840, in the District of Columbia.

2. That by deed dated on, to wit, the 17th day of January, 1927, and recorded among the land records of the District of Columbia, the plaintiff assumed and
38 agreed to pay the aforesaid deed of trust and thereafter on to wit, the 9th day of July, 1928, the plaintiff filed his amended bill of complaint herein, upon which said bill of complaint a temporary injunction was granted to restrain this defendant from foreclosing under said deed of trust. That thereafter, on to wit, the 14th day of August, 1929, the plaintiff was required to give and did thereafter give an additional undertaking in the sum of \$15,000.00 whereupon the aforesaid temporary injunction was continued.

3. That since the 16th day of December, 1927, plaintiff has failed to make any payment on account of principal or interest on said deed of trust, and defendant has been unable to ascertain whether there is now subsisting any fire or other insurance upon the aforesaid property. That this petitioner has ascertained from the public records of the District of Columbia that said property was sold for taxes in 1929 on account of unpaid taxes in the original sum of \$17.39 on Lot 819, in Square 2840 (said Lot 819 having been consolidated with certain other lots and is now embraced in said Lot 820). And petitioner is likewise informed and therefore avers that the said real estate was sold for taxes in 1930 because of the failure of the plaintiff to pay the taxes amounting to \$2402.36 plus penalty, being the taxes due for the year ending June 30, 1929. Petitioner is likewise informed and avers that the taxes for the year ending June 30, 1930 are overdue and unpaid and the amount to \$2,402.36 plus penalty.

4. This petitioner is informed and believes, and therefore avers, that the plaintiff has been and is still receiving all of the income from this large apartment house, the exact amount of which said income this petitioner has been unable to ascertain.

39 5. That in and by paragraph 11 of said amended bill of complaint plaintiff admits that there was advanced to the said Harry A. Bramow, and/or said plaintiff, the sum of \$98,720.00 and while this defendant in its answer filed in this cause denies the accuracy of said amount, nevertheless it is advised and therefore avers that the plaintiff should be required to pay to this defendant the aforesaid admitted amount, to wit, \$98,720.00, the same to be applied on account of the notes aforesaid and the disputed balance to abide the final determination of this cause. And the petitioner further avers that because of the accumulation of interest as aforesaid, the accumulation of taxes as aforesaid, the tax sales as aforesaid, as well as the lack of adequate repairs and improvements in and to the real estate aforesaid, a receiver should be appointed to take over and hold said real estate and the income derived therefrom until the final determination of this cause with full power in said receiver to operate and manage said property under the direction of this court, and that further, the plaintiff should be required to increase the sum of the security given by plaintiff for the continuance of said temporary injunction.

Wherefore, the premises considered, your petitioner prays:

1. A Rule to Show Cause may be issued out of this Honorable Court requiring the plaintiff to show cause, if any he has by a day certain, why he should not be required to pay to this defendant the sum of \$98,720.00, and why a receiver for said property should not be appointed, and why said plaintiff should not give additional security herein.

2. That the plaintiff be directed to pay to this defendant, or its attorney of record, the said sum of \$98,720.00,
40 said sum, if and when so paid, to be credited upon the notes given by the said Harry A. Bramow and secured by the deed of trust aforesaid.

3. That a receiver or receivers be appointed by this Honorable Court for said Real estate with full power to operate and manage the said real estate, receive all income derived therefrom and expressly with power and authority to pay all taxes due and to become due until the final determination of this cause, to place sufficient fire and other insurance on said property, subject to the approval of this

court, and otherwise to do any and all things necessary and proper for the preservation of said property.

4. That the temporary injunction hereto issued be continued only upon condition that the plaintiff increase the security heretofore given in an amount to be fixed by the Court and conditioned according to law.

5. And for such other and further relief as to the Court seems just and proper.

MORTGAGE SECURITY CORPORA-
TION OF AMERICA,
By EDGAR J. HECHT,
Vice-Pres.

LOUIS OTTENBERG,
Attorney for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared Edgar J. Hecht, who being first duly sworn on oath deposes and says that he is the Vice-President of the Mortgage Security Corporation of America, defendant herein; that he is duly authorized to
41 sign the foregoing and annexed petition and makes this verification for and on behalf of said corporation defendant; that the matters therein set forth are true as he verily believes.

EDGAR J. HECHT.

Subscribed and sworn to before me this 17th day of April, 1930.

[NOTARIAL SEAL.]

A. P. WAGNER,
Notary Public, Westchester County.

N. Y. Co. Clerk's No. 101, Reg. No. —.
My Commission Expires March 30, —.

Answer to Petition of Defendant.

Filed May 8, 1930.

* * * * *

1. This plaintiff admits the defendant is the holder of promissory notes purporting to represent a debt for \$110,000.00, on an apartment house located at 11th & Monroe Streets, Northwest.

2. Plaintiff admits the within premises was conveyed to him on the 17th day of January 1927; and that on the 9th day of July 1928, he filed an amended bill of complaint seeking a temporary injunction which was granted, and an undertaking in the amount of \$10,000.00, was filed to safeguard the interest of the defendant, if the injunction was unlawfully issued. Subsequently upon a motion to dismiss the bill of complaint being filed by the defendant, the said bill was dismissed by Mr. Justice Jennings Bailey, on the 19th day of July 1928, from the order of dismissal the plaintiff noted an appeal to the Court of Appeals, supersedeas bond was filed in the amount of \$20,000.00.

42 The Court of Appeals on the 1st day of April, 1929, reversed the order of dismissal 32 Fed. (2) 412, and returned the case to this Court for further hearing in accordance with the opinion rendered therein. On the first day of July 1929, defendant filed a motion to dissolve and revoke the temporary restraining order, which motion was denied on the 22nd day of July 1929. Thereupon a motion to increase the security was filed on the 24th day of July 1929, which motion was granted and the security was increased in the amount of \$15,000.00, and the injunction was continued pendente lite. Plaintiff denies each and every allegation of paragraph two not specifically denied.

3. This plaintiff states that the validity of the deed of trust is now before the Court, and until the validity or invalidity of the said trust is determined by this Court in conformance with the opinion rendered by the Court of Appeals, and no action can be taken by this plaintiff. The plaintiff states further that the assessment of \$17.39, on lot 819, is on a lot dedicated to the District of Columbia for the purpose of making an alley way. This plaintiff is not informed as to the amount of taxes unpaid, but will make inquiries and pay the taxes due and unpaid.

4. The plaintiff admits he is receiving the rents due from the said apartment.

5. The plaintiff denies that he agreed to pay the amount of \$98,720.00 as alleged in paragraph five of the said petition, but plaintiff admits that he agreed to pay the amount of \$91,570.00, and offered to pay the amount to the defendant, and signified his intention to do so by letter submitted through his attorney. The defendant has failed to take any action on the said offer. Copies of let-

43 ters marked Exhibits "A" and "B" carrying offer
to the defendant are attached hereto and it is
prayed they be considered as part of and with this an-
swer. The plaintiff denies that there is an accumulation
of interest due defendant, or taxes or tax sale on the said
property. Deny that the property is lacking in adequate
repairs and improvements. The plaintiff states that im-
provements exceeding \$8,000.00, have been made. Deny
that the defendant is entitled to the appointment of a re-
ceiver as the plaintiff has offered the defendant all they
are lawfully entitled to which offer has not been accepted
by the defendant. This plaintiff is ready and willing to
pay the amount due the defendant, and prays that the case
be referred to a Special Master to report his findings. The
property is amply protected by insurance.

Wherefore this plaintiff prays that the said petition be
dismissed with costs.

JERRY MAIATICO.

ALFRED CERCEO,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, ss:

Jerry Maiatico, being first duly sworn, on oath deposes
and says that he has read the foregoing answer by him
subscribed, knows the contents thereof and verily believes
the facts stated therein to be true.

JERRY MAIATICO.

44 Subscribed and sworn to before me this 1st day
of May, 1930.

[NOTARIAL SEAL.]

LOU H. CADARR,
Notary Public.

EXHIBIT A.

"June 20, 1929.

Mr. Alfred Cerceo,
416 Fifth St. N. W.,
Washington, D. C.

DEAR MR. CERCEO:

I am in receipt of your letter of recent date with regard
to settlement of Equity Case No. 48,557, entitled Jerry
Maiatico vs. Mortgage Security Corporation of America,

Successors to Mortgage Bond and Guaranty Corporation, et al. Under the decision of the Court of Appeals of the District of Columbia, I am prepared — tender and hereby tender the amount to the defendant which I am required to pay under the aforesaid decision of \$91,570, which is the amount due, as I figure it out with all proper adjustments.

Please advise me of result of your efforts along the line of this settlement.

Very truly yours,

JERRY MAIATICO.”

EXHIBIT B.

“June 21, 1929.

Louis Ottenberg, Esq.,
Wilkins Building,
Washington, D. C.

DEAR MR. OTTENBERG:

I have this day received a letter from Mr. Maiatico, with reference to Equity Case 48,557, and I am enclosing the letter herewith for your information, with reference to settling the case. You will note that Mr. Maiatico, agrees to pay the amount of \$91,570.00, to the defendant.

Please advise me what your clients propose to do in this matter.

Very truly yours,

ALFRED CERCEO.

Filed May 27, 1930.

* * * * *

Upon consideration of the petition for rule to show cause filed herein on the 24th day of April, 1930, the rule issued thereon, the answer of the plaintiff thereto and after argument in open court, it is by the court this 27th day of May, 1930,

Ordered that the temporary injunction heretofore issued in the above-entitled cause be and the same is hereby dissolved unless said plaintiff shall on or before the 27th day of June, 1930, at three P. M., pay to the defendant Mortgage Security Corporation of America, or its attorney of

record, the sum of Ninety-one Thousand Five Hundred Seventy Dollars (\$91,570.00) admitted to have been received by the plaintiff from the Mortgage Bond and Guaranty Corporation and/or the defendant Mortgage Security Corporation of America, the said sum of \$91,570.00 when so paid to be credited upon the notes given by Harry A. Bramow and secured by deed of trust recorded among the Land Records of the District of Columbia in Liber 5892 at folio 302; and unless said plaintiff shall give an additional undertaking in the sum of \$30,000 conditioned according to law, with surety to be approved by the court, the court deeming such additional security to be necessary and proper under the circumstances presented by the pleadings; provided, however, that nothing herein contained shall be deemed or construed as releasing or discharging the plaintiff and/or the sureties on the undertaking hereinbefore given.

ALFRED A. WHEAT,
Justice.

46

Findings of Fact.

Filed June 26, 1931.

* * * * *

The above-entitled cause having regularly come on for trial on the pleadings, and the testimony adduced on behalf of the plaintiff and defendants, the Court finds the facts as follows:

1. That on or about the 9th day of December, 1926, Harry A. Bramow was the owner of the certain land and premises described in the 5th paragraph of plaintiff's amended bill of complaint filed herein, on which property he proposed to build an apartment-house. He made an application to the Mortgage Bond and Guaranty Corporation for a building or construction loan of \$110,000.00 for a term of five years, with interest at the rate of 6½% per annum, agreeing to pay a commission of 6%, or \$6600.00, for said loan.

2. That said application having been approved by said Mortgage Bond and Guaranty Corporation, said Bramow and wife on, to wit, the 9th day of December, 1926, executed and delivered a first deed of trust conveying said land and

premises to the defendants Kite and Hughes, Trustees, to secure said Mortgage Bond and Guaranty Corporation in the sum of \$110,000.00, due five years after date and bearing interest at the rate of 6½% per annum.

3. Thereafter said Bramow began the construction of an apartment-house on said land, and the plaintiff, Jerry Maiatico, became and was one of the sub-contractors on said job, and also one of the guarantors on the completion bond given by Bramow to said Mortgage Bond and Guaranty Corporation.

4. That before the erection of said apartment-
47 house was completed, and for a good and valuable consideration, said Bramow and wife by deed dated January 17, 1927, and recorded January 19, 1927, conveyed said property to the plaintiff, Jerry Maiatico, who completed the erection of said building. In and by said deed, which was accepted by said Maiatico, and under which he claimed the property and his rights therein, and the balance of the moneys due under said construction loan, a copy of said deed being annexed to plaintiff's amended bill of complaint filed herein and made a part thereof, said Maiatico assumed and agreed to pay the then existing first and second deeds of trust of record on said property. That on, to wit, the 25th day of January, 1927, Bramow requested the said Mortgage Bond and Guaranty Corporation to make all further payments under said construction loan to said Maiatico.

5. That the Mortgage Bond and Guaranty Corporation, and its successor, the Mortgage Security Corporation of America, paid to said Bramow and Maiatico, directly or for their account, the sum of \$103,400.00 under said first deed of trust.

6. That on, to wit, June 8, 1927, Maiatico paid the semi-annual interest on said loan of \$110,000.00, amounting to \$3575.00, and on, to wit, December 16, 1927, he also paid the semi-annual instalment of interest of \$3575.00. That thereafter he paid no further interest on said loan.

7. That on, to wit, the 9th day of July, 1928, plaintiff was in arrears in the payment of taxes on the property secured by the deed of trust in the sum approximately of \$1200.00. No specific demand was made by the Mortgage Company on plaintiff to pay these taxes, but it was the duty of plaintiff to pay the same without demand.

Plaintiff had not paid any interest falling due on June 9, 1928 on the notes secured by the first trust. Defendant at that time claimed to be entitled to interest on the full amount of said notes, to wit, \$110,000.00. The Mortgage Company caused the property to be advertised for sale at public auction on July 9, 1928 for default under the first deed of trust; the advertisement did not state of what the default consisted.

8. That on July 6, 1928, plaintiff filed his original bill of complaint herein, praying, among other things, for an injunction to restrain said proposed sale, and upon his filing an amended bill of complaint on July 9, 1928, a temporary restraining order was passed herein on July 9, 1928. Thereafter an injunction pendente lite was issued in this cause.

9. By an order passed herein on May 27, 1930, the aforesaid temporary injunction was dissolved unless the plaintiff should on or before the 27th day of June, 1930, at three o'clock P. M., pay to the defendant Mortgage Security Corporation of America, or its attorney of record, the sum of \$91,570.00 admitted to have been received by the plaintiff, and unless the plaintiff should give an additional undertaking in the sum of \$30,000.00, said order providing further that nothing therein contained should be deemed or construed as releasing or discharging the plaintiff and/or his sureties on the undertakings theretofore given in this cause. The plaintiff having failed to comply with the aforesaid order, the defendant Trustees offered the property for sale at public auction on July 10, 1930, but said sale not having been consummated, the trustees claiming the purchaser's deposit of \$5,000.00 was forfeited, the property was re-advertised and on October 17, 1930 was sold at public auction to Louis Barber for the sum of \$95,000.00.

10. The plaintiff did not pay or tender payment in cash of the taxes due on July 9, 1928, nor did the defendant pay the same until after the foreclosure sale held October 17, 1930. Defendant Mortgage Company claimed to be entitled to interest on the full amount of said notes, to wit, \$110,000.00. That on to wit, July 10, 1930, at about 3:30 P. M., plaintiff and one of his attorneys went to the office of the attorney for the defendant to tender to said attorney payment of said taxes and the expense of foreclosure, but not to tender any interest; that neither plain-

tiff nor his said attorney had ascertained the amount of taxes due; that plaintiff had between \$6,000.00 and \$7,000.00 in cash with him at the time for the purpose aforesaid. Defendants' attorney was not in his offices at the time of plaintiff's visit, but was informed by other attorney in said offices that defendants' attorney had left for the day, but would be present at the auction sale to be held that date at 5:00 P. M. in front of the premises to be sold; thereupon, for the same purpose, plaintiff and his said attorney went to the offices of the Trustees named in the Deed of Trust, but was informed that Trustee Kite had left for the day and that Trustee Hughes was out of the city. That upon advice of his counsel, that if he attended said foreclosure sale, he would approve of it, the plaintiff did not attend the sale, although the Trustee Kite was there present as was also the defendants' attorney. At said sale one Battista being the highest bidder, the property was knocked down to him at \$99,900 and he put up a deposit of \$5000.00 with said Trustees, but said sale to said Battista not having been consummated, the Trustees claiming said purchaser's deposit of \$5000.00 was forfeited, the property was readvertised and on October 17, 1930, was sold at public auction to Louis Barber for the sum of \$95,000.00.

50 11. That on July 9, 1928, the defendants were entitled to make the sale which they were then advertising and therefore a temporary restraining order passed herein on July 9, 1928, and the injunction pendente lite issued in this cause thereafter, were wrongfully and inequitably sued out and that by reason thereof the defendant Mortgage Security Corporation of America is entitled to recover damages as follows: (1) Interest on \$103,400.00 from July 9, 1928 when said temporary restraining order was issued to June 27, 1930, when said injunction pendente lite was dissolved, amounting to \$12,201.20 with interest; (2) the sum of \$5,289.07, being the amount of taxes which accrued on said property between September, 1928 and June 27, 1930, with adjusted penalty thereon, said defendant Mortgage Security Corporation of America having paid said taxes and penalty, together with interest on said sum of \$5,289.07 from October 17, 1930; and (3) the sum of \$2000.00 being reasonable attorney's fee incurred by said defendants in obtaining a dissolution of said restraining order and preliminary injunction. And said defendant

Mortgage Security Corporation of America is entitled to a decree against the plaintiff and the sureties on his several undertakings filed herein for said damages and attorney's fee as hereinafter found.

12. When said temporary restraining order was issued, plaintiff gave an undertaking in the sum of \$10,000.00 with the Hartford Accident & Indemnity Co., as surety. Of the damages and attorney's fee aforesaid, the defendant Mortgage Security Corporation of America is entitled to recover from the plaintiff and said surety, Hartford Accident and Indemnity Co., the sum of \$9,918.95 with interest on \$9,418.95 at the rate of 6% per annum from August 15, 1929. That pursuant to an order passed herein on August 14, 1929, plaintiff secured a continuance of said injunction

pendente lite by giving an injunction undertaking in
51 the sum of \$15,000.00 with the New Jersey Fidelity
& Plate Glass Insurance Co., as surety. Of the damages and attorney's fee aforesaid, the defendant Mortgage Security Corporation of America is entitled to recover from the plaintiff and said surety, New Jersey Fidelity & Plate Glass Insurance Co., the sum of \$9,571.32 with interest on \$8,071.32 at the rate of 6% per annum from June 27, 1930.

13. That the plaintiff failed to make out a case entitling him to the relief sought in his original and amended bills of complaint filed herein and the defendants are entitled to a decree dismissing said original and amended bills of complaint, with damages and attorney's fees as hereinbefore ascertained.

JESSE C. ADKINS,

Justice.

Conclusions of Law.

* * * * *

From the facts as found, the Court states the following conclusions of law:

1. The plaintiff assumed and agreed to pay the first and second deeds of trust of record on the property described in the amended bill of complaint at the time he accepted the deed to said property from Barmow and wife dated January 17, 1927, but by the conduct of the parties was substituted for Bramow in the transaction involving said first

trust loan. Plaintiff can, therefore, raise the question of usury.

2. That the Mortgage Bond & Guaranty Corporation and its successors, the Mortgage Security Corporation of America, having paid to Bramow and Maiatico the
52 sum of \$103,400.00 out of the sum of \$110,000.00 agreed to be loaned, and having retained the difference amounting to \$6,600.00 as commission, the transaction was usurious.

3. That the plaintiff was in default under said first deed of trust on July 9, 1928 when the defendants had advertised said real estate for sale at public auction for default under said first deed of trust and the defendants were then legally entitled to have said foreclosure sale as advertised; and plaintiff was also in default on July 10, 1930, when said real estate was offered for sale at public auction for default under said deed of trust; and he was also in default on October 17, 1930, when the said property was again offered for sale at public auction and when the property was finally sold, and the plaintiff has been in default ever since.

4. That the plaintiff has never paid or made legal tender in cash of the principal sum of \$103,400.00 actually received by said Bramow and/or the plaintiff, and/or interest legally due by the plaintiff to the defendant Mortgage Security Corporation of America, except the sum of \$7,150.00 paid on or before December 16, 1927, or of the taxes due on said property and paid by said defendant Mortgage Co.

5. That on July 9, 1928, the defendants were entitled to make the sale which they were then advertising and therefore a temporary restraining order passed herein on July 9, 1928, and the injunction pendente lite issued in this cause thereafter, were wrongfully and inequitably sued out and that by reason thereof the Defendant Mortgage Security Corporation of America is entitled to recover damages as follows: (1) Interest on \$103,400.00 from July 9, 1928 when said temporary restraining order was issued to June 27,
1930, when said injunction pendente lite was dis-
53 solved, amounting to \$12,201.20 with interest; (2) the sum of \$5,289.07, being the amount of taxes which accrued on said property between September, 1928 and June 27, 1930, with adjusted penalty thereon, said defendant Mortgage Security Corporation of America having paid said taxes and penalty, together with interest on said sum

of \$5,289.07 from October 17, 1930; and (3) the sum of \$2,000.00 being reasonable attorney's fee incurred by said defendants in obtaining a dissolution of said restraining order and preliminary injunction. And said defendant Mortgage Security Corporation of America is entitled to a decree against the plaintiff and the sureties on his several undertakings filed herein for said damages and attorney's fee as hereinafter found.

6. When said temporary restraining order was issued, plaintiff gave an undertaking in the sum of \$10,000.00 with the Hartford Accident & Indemnity Co., as surety. Of the damages and attorney's fee aforesaid, the defendant Mortgage Security Corporation of America is entitled to recover from the plaintiff and said surety, Hartford Accident and Indemnity Co., the sum of \$9,918.95 with interest on \$9,418.95 at the rate of 6% per annum from August 15, 1929. That pursuant to an order passed herein on August 14, 1929, plaintiff secured a continuance of said injunction pendente lite by giving an injunction undertaking in the sum of \$15,000.00 with the New Jersey Fidelity & Plate Glass Insurance Co., as surety. Of the damages and attorney's fee aforesaid, the defendant Mortgage Security Corporation of America is entitled to recover from the plaintiff and said surety, New Jersey Fidelity & Plate Glass Insurance Co., the sum of \$9,571.32 with interest on \$8,071.32 at the rate of 6% per annum from June 27, 1930.

54 7. That the plaintiff failed to make out a case entitling him to the relief sought in his original and amended bills of complaint and the defendants are entitled to a decree dismissing said original and amended bills of complaint, with costs, and are also entitled to a decree for damages and attorney's fee against the plaintiff and the sureties on his said undertakings in the amounts hereinbefore ascertained.

JESSE C. ADKINS,

Justice.

Final Decree.

Filed June 26, 1931.

* * * * *

This cause coming on to be heard upon the original and amended bills of complaint, the answers of the defendants, and the other pleadings herein, and the testimony taken

in open Court, and it appearing to the Court that the plaintiff is not entitled to maintain his bill of complaint against said defendants for the reasons set forth in the findings of fact and conclusions of law filed herein, and it further appearing to the Court that the temporary restraining order and injunction pendente lite issued in this cause were wrongfully and inequitably sued out and that the defendant, Mortgage Security Corporation of America is entitled to the damages as ascertained by the Court, it is, by the Court, this 26th day of June, 1931,

Adjudged, ordered and decreed that the original and amended bills of complaint filed herein by the plaintiff be and the same are hereby dismissed, with costs.

55 It is further adjudged, ordered and decreed that the temporary restraining order passed herein on to wit, July 9, 1928, and the injunction pendente lite issued thereafter in this cause, were wrongfully and inequitably sued out, and that by reason thereof, the defendant, Mortgage Security Corporation of America, have and recover as damages the sum of \$17,490.27 with interest at the rate of 6% per annum on \$9,418.95 from August 15, 1929 and on \$8,071.32 from June 27, 1930, together with the further sum of \$2000.00 as fees to its attorney of record herein; that said plaintiff and the Hartford Accident & Indemnity Co., the surety on plaintiff's undertaking given to secure said temporary restraining order, shall pay to said defendant, Mortgage Security Corporation of America, of the aforesaid damages and attorney's fee, the sum of \$9,918.95 with interest on \$9,418.95 at the rate of 6% per annum from August 15, 1929 and that said plaintiff and the New Jersey Fidelity & Plate Glass Insurance Co., the surety on plaintiff's undertaking given to secure said injunction pendente lite, shall pay to said Mortgage Security Corporation of America, of the aforesaid damages and attorney's fee, the sum of \$9,571.32 with interest on \$8,071.32 at the rate of 6% per annum from June 27, 1930; and that said Mortgage Security Corporation of America shall have execution under this decree for the sums aforesaid against the said plaintiff and the said sureties as at law.

Further ordered, adjudged and decreed that \$6600 in amount of the first deed of trust notes made by Bramow, held by Mortgage Security Corporation of America and

secured on the property herein involved be and the same are hereby cancelled.

JESSE C. ADKINS,

Justice.

56 From the foregoing decree plaintiff notes an appeal in open court to the Court of Appeals, and the Court hereby fixes the supersedeas bond at \$24,000, or \$100 cost bond.

JESSE C. ADKINS,

Justice.

Memorandum.

July 21, 1931.—Supersedeas undertaking for \$24,000 approved and filed.

Amended Assignment of Errors.

Filed August 25, 1931.

* * * * *

Now comes the plaintiff and files the following amended assignments of error on the appeal to the Court of Appeals in this cause:

1. That the Court erred in holding that the injunction pendente lite and restraining order were wrongfully and improvidently issued and that plaintiff was not entitled to relief:

2. The Court erred in dismissing the amended bill of complaint:

3. The Court erred in vacating the injunction pendente lite and/or temporary restraining order and in requiring, on condition of its or their continuance, plaintiff to pay in cash the sum of \$91,570 and post additional undertaking, without, at the same time, ordering the release of the deed of trust in order to enable plaintiff to raise said money on said property, the said principal not being due at the time.

4. The Court erred in refusing to allow the \$7150
57 paid by plaintiff to be credited on the principal of \$103,400.

5. The Court erred in allowing defendant interest on \$103,400 during the time said injunction was in effect.

6. The Court erred in allowing defendant as damages, interest, taxes, and counsel fees.

7. The Court erred in its holding that there was a default in the terms of said deed of trust when said proposed sale of said property was enjoined in July, 1928.

8. The Court erred in holding that there was a default under said trust in July, 1928, by reason of non-payment of interest, which interest was forfeited.

9. The Court erred in failing to make defendants account for the \$5000 received by them from the Battista sale and applying same toward and for benefit of plaintiff.

10. That the Court erred in failing to give plaintiff credit for the \$4000 which he had not received, and, notwithstanding, charging him with interest thereon.

11. The Court erred in holding that, in July, 1930, plaintiff was in default, and that plaintiff had not tendered taxes.

12. The Court erred in holding that, notwithstanding defendants had sold said property in July, 1930, and had received \$5000 therefor and that the purchaser had filed suit to enforce the sale, that plaintiff was still required to pay the taxes, and in holding that the final sale in October, 1930 was justifiable on the ground that plaintiff was in default.

13. The Court erred in excluding evidence of the plaintiff to the effect that in July and in October, 1930, there was a *lis pendens* on the title of the property.

GEORGE P. LEMM,
Attorney for Plaintiff.

GEORGE P. LEMM, Esq.

Memoranda.

August 25, 1931.—Statement of Evidence (in duplicate) filed.

September 28, 1931.—Statement of Evidence (in duplicate) signed and filed.

Designation of Record.

Filed August 25, 1931.

* * * * *

The plaintiff having perfected an appeal to the Court of Appeals of the District of Columbia, in the above-en-

titled cause, the Clerk of this Court is requested to kindly prepare and make a part of this transcript of record on appeal in this cause the following papers:

1. Amended Bill of Complaint filed July 9, 1928.
2. Temporary Restraining Order issued July 9, 1928.
3. Injunction Undertaking (\$10,000.00) with Hartford Accident and Indemnity Co. surety.
4. Motion to Dismiss Amended Bill of Complaint, filed July 17, 1928.
5. Order Dismissing Amended Bill of Complaint, filed July 19, 1928.
6. Temporary Injunction, filed July 26, 1928.
7. Order Vacating Decree Dismissing Amended Bill of Complaint, filed June 1, 1929.
8. Answer of Defendants Numbered 2 and 3, filed July 1, 1929.
- 59 9. Answer of Defendant Number 1, filed July 1, 1929.
10. Motion of Defendants to Increase Injunction Undertaking, filed July 24, 1929.
11. Order Increasing Injunction Undertaking, filed August 14, 1929.
12. Additional Injunction Undertaking, filed August 14, 1929, with New Jersey, Fidelity and Plate Glass Ins. Co., surety.
13. Petition of Defendants for Appointment of Receiver, etc., filed April 24, 1930.
14. Answer of Plaintiff to said Petition of Defendants, and Exhibits, filed May 8, 1930.
15. Order for Plaintiff to Pay Defendant Number 1, Certain Sums, etc., filed May 27, 1930.
16. Findings of Fact by Mr. Justice Adkins, filed June 26, 1931.
17. Conclusions of Law signed by Mr. Justice Adkins, filed June 26, 1931.
18. Final Decree Dismissing Original and Amended Bills of Complaint, etc., filed June 26, 1931.
19. Memo-Appeal of Plaintiff noted in Open Court.
20. Supersedeas Bond on Appeal filed July 21, 1931, for \$24,000.00, with New Jersey, Fidelity and Plate Glass Insurance Company, surety.

21. Amended Assignments of Error.

22. This designation.

GEORGE P. LEMM,
Attorney for Plaintiff.

Approved.

LOUIS OTTENBERG,
Attorney for Defendants.

60 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 59, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48557 in Equity, wherein Jerry Maiatico is Plaintiff and Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation, et al. are Defendants. as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of November, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

61 Filed Sep. 28, 1931. Frank E. Cunningham, Clerk.

In the Supreme Court of the District of Columbia.

Equity No. 48557.

JERRY MAIATICO, Plaintiff,

vs.

MORTGAGE SECURITY CORPORATION OF AMERICA, etc., et al.,
Defendant-.

Statement of Evidence.

Be it remembered that the above-entitled cause duly came on for hearing before the Honorable Jesse C. Adkins, Asso-

ciate Justice of the Supreme Court of the District of Columbia, on the 26th day of June, 1931, Alfred Cerceo, Esq. and George P. Lemm, Esq., appearing for the plaintiff, and Louis Ottenberg, Esq., appearing for the defendants; and thereupon, to sustain the issues upon his part joined, plaintiff, **Jerry Maiatico**, testified in substance as follows:

That he is the plaintiff in this suit, and that he knows and had business dealings with one Harry A. Bramow; that in 1926 he was doing the brick work for Mr. Bramow, as a subcontractor on an apartment house which said Bramow had commenced to build at 11th and Monroe Streets, Northwest; that he was a Co-surety on the bond which Bramow had given to the defendant Mortgage Company in connection with the construction loan; and that after plaintiff had finished the brick work up to the first floor, a payment was due from Bramow for that work; that Bramow failed to make said payment; that Bramow had received \$5500.00 from the Mortgage Company, being the first payment to Bramow from the Mortgage Company under the deed of trust dated December 9, 1926, for \$110,000, a copy of which said deed of trust being attached to the amended bill of complaint as Exhibit A; that Maiatico knew that Bramow had arranged for this construction loan; that there was some argument between witness and Bramow as to the payment for his work on that job; thereupon the Court admitted into evidence the deed dated January 17, 1927 from said Bramow and wife to Jerry Maiatico (a copy of which being attached to plaintiff's amended bill of complaint filed herein as Exhibit B); that Bramow also executed and delivered to plaintiff the following paper writing:

“Washington, D. C., January 25, 1927.

Mortgage Bond & Guaranty Corp'n,
Washington, D. C.

GENTLEMEN:

This is to advise you that I have sold Eleventh and Monroe Streets, N. W., known as Lots 804-5-6-7, Square 2840, now in the course of construction, to Jerry Maiatico.

In connection with the balance remaining due account of the construction loan, I hereby request that all future payments be made to Jerry Maiatico, subject to all of the terms

and conditions of the loan as agreed by you, same remaining in full force.

Yours very truly,

HARRY A. BRAMOW.

Witness:

WM. P. STORM.

Witness:

WM. P. STORM.

Accepted.

JERRY MAIATICO.”

That thereafter Maiatico finished the construction of said building and, during the course of construction, the defendant Mortgage Company made certain payments under the construction loan as follows:

January 20, 1927, by check payable to the order of Harry A. Bramow, \$10,010.00, which, after being endorsed by Bramow, was received by plaintiff; checks dated February 1, 1927, February 9, 1927, March 16, 1927, April 4, 1927 and April 19, 1927, each in the sum of \$10,340.00, and \$20,000.00 on June 6, 1927, were received by plaintiff; that, in addition thereto, plaintiff received \$11,510.00 from Bramow early in March, 1927, although a check for \$15,510.00 was issued

63 by the defendant Mortgage Company to the order of plaintiff, but plaintiff's endorsement thereon was forged by said Bramow, the latter turning over to plaintiff only the sum of \$11,510.00; that for the difference of \$4,000.00 plaintiff sued the District National Bank for cashing said check on said forged endorsement and plaintiff obtained judgment against said Bank for said amount, from which judgment said Bank appealed and said appeal is now pending; that thereafter, and by checks dated June 8, 1927 and December 16, 1927 for \$3575.00 each, plaintiff paid, and defendant received, semi-annual interest due in June 1927 on the full amount of the loan of \$110,000.00, and semi-annual interest due in December, 1927 on the full amount of the \$110,000.00 loan, interest at 6½% per annum, each of said checks bearing the following endorsement:

“Deposit to Credit of Mortgage Security Corporation of America, Norfolk, Virginia, Successors to Mortgage Bond and Guaranty Corporation, Washington, D. C.”

That over the objection and exception of defendants the following letters were introduced in evidence, and counsel for the defendants admitted in open court having received the same by registered mail on June 22, 1929:

“June 20, 1929.

“Mr. Alfred Cerceo,
416 Fifth Street N. W.,
Washington, D. C.

DEAR MR. CERCEO:

“I am in receipt of your letter of recent date with regard to settlement of Equity Case No. 48557, entitled Jerry Maiatico vs. Mortgage Security Corporation of America, Successors to Mortgage Bond and Guaranty Corporation et al. Under the decision of the Court of Appeals of the District of Columbia, I am prepared to tender and hereby tender the amount to the defendant which I am required to pay under the aforesaid decision of \$91,570.00, which is the amount due, as I figure it out with all proper adjustments.

“Please advise me of result of your efforts along the line of this settlement.

“Very truly yours,

JERRY MAIATICO.”

and

64

“June 21, 1929.

“Louis Ottenberg, Esq.,
Wilkins Building,
Washington, D. C.

DEAR MR. OTTENBERG:

“I have this day received a letter from Mr. Maiatico, with reference to Equity case 48,557, and I am enclosing the letter herewith for your information, with reference to settling the case. You will note that Mr. Maiatico, agrees to pay the amount of \$91,570.00, to the defendant.

“Please advise me what your clients propose to do in this matter.

“Very truly yours,

ALFRED CERCEO.”

Plaintiff further testified that he didn't have the money himself but that he was to arrange for a loan in that

amount and that he had several people who were getting money to pay off the original loan; that, in company with Mr. Lemm (one of his attorneys) plaintiff went over to the offices of Mr. Ottenberg (defendants' attorney) on July 10, 1930, before and on the day of the proposed foreclosure sale, and, not finding him in, and being informed that he would not return that afternoon, but would be at the auction sale at 5 P. M. that day, he proceeded, in company with Mr. Lemm, to the offices of the trustee defendants, neither of whom was in his office or expected to return that day; that the trustee defendant Hughes was out of the city and would not return until the following day; that plaintiff's visit to said places was "to take care of the taxes, or something like that," and that he had around about \$8000.00 and \$7000.00 in cash with him but did not know what the taxes amounted to; that he did not attend the sale; that he was advised by counsel that he wasn't to attend the sale, because it would be an approval of such sale.

On cross examination, he testified that in December, 1926 when the work started, he and Bramow were good friends; that he did not know that the deed from Bramow to
65 him was dated January 17, 1927; that he never saw the deed, but supposed Bramow put it on record; that about January 20, 1927 Bramow got a check from the Mortgage Company for \$10,010 and endorsed and delivered it to plaintiff; that early in March, 1927, he ascertained that Bramow had received the check for \$15,510.00, and thereupon plaintiff called upon Mr. Petit, local manager of the defendant Mortgage Company, and Petit produced the receipt therefor, which Bramow had previously caused to be signed without witness' knowledge, and Mr. Petit wrote thereon the word "approved" and had the witness sign it. Said receipt was then offered in evidence and is as follows:

Mch. 25/27, February 17, 1927.

"Mortgage Bond and Guaranty Corporation,

"Denrike Building,

"1010 Vermont Avenue N. W.,

"Washington, D. C.:

"Received of Mortgage Bond & Guaranty Corporation their check No. 5783 dated this date, in the amount of \$15510.00 representing fifth payment account "Roof Pay-

ment" on construction of apartment house situate S. E. corner 11th & Monroe Sts., N. W. Above check payable to the order of Jerry Maiatico, as per agreement on file.

JERRY MAIATICO,
Per BELLA WOLF.

"Approved.

JERRY MAIATICO."

That in August, 1927, defendant Mortgage Company prepared a statement of the loan, which statement was duly admitted in evidence, and is as follows:

"August 17, 1927.

"Statement of Loan Standing in the Name of Jerry Maiatico.

"Lots 804-807, Inclusive, Square 2840.

"Amount of Loan.....	\$110,000.00
"January 6, 1926... Payments made	\$5,500.00
"January 20, 1927..	" " 10,010.00
"February 1, 1927..	" " 10,340.00
"February 9, 1927..	" " 10,340.00
"March 1, 1927.....	" " 10,340.00
"March 16, 1927....	" " 10,340.00
"April 4, 1927	" " 10,340.00
"April 19, 1927	" " 10,340.00
"June 6, 1927.....	" " 20,000.00
	\$102,720.00
66 "Amount of Discount	6,600.00
	\$109,320.00
"Premium Account Builders Risk	70.79
"Premium account 5 year Policy, Mass. Fire & Marine \$30020	1,892.00
"Surveyors Plat.....	15.00
"Photographs	3.00
	111,300.79
"Balance due to settle.....	\$1,300.79
"Less Credit a/c reduced rate on above fire ins. policy.....	1,270.15
"(Check of Mortgage Sec. Corp. of Am. payable to Jerry Maiatico).	\$30.64 Due us."

Witness admitted receiving checks dated February 9, 1927, March 16, 1927, April 4, 1927, April 19, 1927, and that he signed receipts therefor, and that witness also signed the following receipt:

“Mortgage Bond and Guaranty Corporation, Washington,
D. C.

“*Payments on 11th & Monroe St. Job.*

First payment—Footings..	5500	5% June 6.
Second payment — First Floor	10010	10% Jan. 20.
Third payment — Second floor	10340	10% Feb. 1st.
Fourth payment—Third floor	10340	10% Feb. 19th.
Fifth payment—Roof.....	15510	15% Mch. 1st.
Sixth payment—Studded out	10340	10% Mch. 16th, 1927.
Seventh payment—plastered	10340	10% April 4, 1927.
Eighth payment—Trimmed out	10340	10% April 19th, 1927.
Ninth payment—Final pay- ment	20000	20% June 6, 1927.
Total		100%

June 6, 1927.

Received check No. 1, drawn on Riggs National Bank, account ‘Construction Loan account’ for \$20,000.00, dated June 6, 1927.

“JERRY MAIATICO.”

Witness further testified that he had been over to see Mr. Petit, manager of the Mortgage Company, more than once, and demanded payment of the money under the loan over and above the amount he had received, telling them that he was about \$6500.00 short on money and \$4000.00, \$10,-500, and that was around June or July 1927 sometime and that Mr. Petit “was telling me” they were going to
67 take care of witness; that he did not remember pay-
ing them \$30.64 on or about August 17, 1927; that
when they gave him the check for \$20,000 he was needing

money badly to pay his bills; that he never went out to the job with Mr. Petit; that there was a mix up of about \$15.00 or \$30.00 in taxes on account of some property which had been given to the District—a piece of land taken out from the lots; that when witness and Mr. Lemm went to Mr. Ottenberg's offices on the day of the proposed sale in July, 1930, he was there informed that Mr. Ottenberg would be at the auction sale at 5:00 o'clock.

On re-direct examination, he testified that he also went to the office of the defendant Mortgage Company about March 16th or 17th, 1927, and told Mr. Petit that Bramow had said that defendant had made a mistake in giving Bramow a check in his name; that Bramow had given witness \$11,510.00, and Bramow had informed witness that the check was only for the latter amount, \$11,510.00, and witness told Mr. Petit not to give Bramow any more checks or to make any further mistakes; that Petit showed plaintiff the check Bramow got for \$15,510.00, and witness told Petit he had only received \$11,510.00; and Mr. Petit produced this receipt for witness to sign for \$15,510.00 and told witness, "Maiatico, we will take care of you; we are people of forty-nine or fifty million dollars corporation; you ain't going to lose any money with us," so that is why he signed the receipt; that he never received the difference of \$4000.00; that he did not authorize Bramow to sign his name to that check. The record was introduced in evidence of the case of Maiatico against the District National Bank for \$4000.00, being suit for the difference between \$11,510.00 which he received and the \$15,510.00 representing the check which Bramow received. Witness testified that plaintiff had obtained judgment against the Bank, who appealed the case, and which appeal is pending.

Whereupon plaintiff called as a witness in his behalf one **James Byron Brooks**, who testified that he was
68 the head bookkeeper in the Riggs National Bank; defendants' counsel admitted that there was no special account kept by the defendants in any bank for the purpose of this loan either for the account of Bramow or plaintiff; that at no time from December 8 to December 31, 1926 was there on deposit in the Riggs Bank to the credit of the defendant Mortgage Company the amount of \$110,000.00 or \$100,000.00.

On cross examination witness testified that the amount on deposit in the Mortgage Company's account on December 9, 1926 was \$54,676.46. On re-direct examination he testified that said amount of \$54,676.46 was not, nor was any amount of said account, segregated and placed to the credit of Bramow.

Whereupon plaintiff rested.

Thereupon, to sustain its defense, defendant called **George E. Cox**, who testified on behalf of the defendants, in substance, as follows: that he was chief draftsman to the Assessor of Taxes and had produced, under subpoena, the official real estate tax lists, and that taxes in amount of \$36.13 were due on lot 806 (being part of the property in question) on July 9, 1928, and also that on lot 812 taxes in amount of \$1145.67 were due for the second half of the fiscal year—1927-28, also taxes were then due on lot 819, amounting to \$15.35, and penalty from April 1, 1928 at one per cent per month was then due on said \$1145.67 and said \$15.35 and said \$36.13, all of which said taxes were overdue by some two or three months on July 9, 1928, the same having been due in March, 1928. That said properties were sold for said taxes on January 15, 1929; that on July 1, 1928 said lots were combined into one lot known as Lot 820, Square 2840.

Thereupon **George P. Lemm** testified on behalf of the defendants, in substance, that he was one of the attorneys of record for the plaintiff in this case and that after 3 P. M. and after the tax office had closed on July 10, 1930, he, in company with plaintiff, went to the offices of Mr.

69 Ottenberg and the two trustee defendants, and at Mr. Ottenberg's office was informed that Mr. Otten-

berg would not return that day but would be at the auction sale at 5:00 o'clock—the time set for the auction sale; that he never went out to the sale to see if Mr. Ottenberg was there, but that plaintiff gave witness \$5000.00 in cash and had more money with him, which money was given him for a tender of any taxes that might be due; that he did not know the amount of taxes in arrears and the expense of sale at that time, but came to inquire; that the auction sale was being conducted by the defendant

trustees. On cross examination he testified that prior to July 10, he went to Mr. Ottenberg's office and had a discussion with him to inquire about the proposed foreclosure and the ground of said foreclosure and was informed by Ottenberg that the court had signed an order dated May 23, 1930 requiring Maiatico to pay a certain amount of principal and that the interest was overdue and that is the only reason witness could recall being told by Mr. Ottenberg why the property was being sold. On re-direct examination, witness stated that he did not recall anything being said about the overdue taxes; that the reason why tax money instead of interest money or principal was brought over to Ottenberg's office was because he had been retained by plaintiff just a short time prior thereto and after being retained by plaintiff had talked with Ottenberg and then perused the record in the case and then came to the conclusion that the only thing that could be due the defendant Mortgage Company, if anything, was overdue taxes and that would be the only ground of foreclosure if one existed. On re-cross examination he testified that he went to the offices of both trustees after he could not find Mr. Ottenberg in his office; thereupon and at the offices of trustee defendant Hughes he ascertained that said defendant was out of the city and would not be back in time for the sale and that trustee defendant Kite was not in his office and was not expected to return that day.

70 Thereupon the defendants called as a witness in their behalf **Fernand Petit**, who testified, in substance, that in December, 1926 he was Vice President and General Manager of the defendant Mortgage Bond and Guaranty Corporation and that he, as such officer, arranged for the construction loan to Bramow with which to build the apartment building at 11th and Monroe Streets; that leading up to the approval of the loan, application therefor was filed with his company and the plans and specifications were gone over, the loan approved and the usual formalities were carried through, and that in January of 1927 Bramow called for and received the first payment under the loan aforesaid, as the work progressed, said payment amounting to \$5500.00, and gave the following receipt therefor:

“January 6, 1926.

“Received of the Mortgage Bond & Guaranty Corporation their check No. 5721 drawn on the Riggs National Bank dated January 6th, 1926, in the amount of \$5500.00, payable to the order of Harry A. Bramow, representing first payment ‘Footings’ on construction loan for apartment situate on lots 804-7, square 2840, southeast corner Eleventh & Monroe Streets, N. W.

“HARRY A. BRAMOW.
B. W.”

That on January 20, 1927, he delivered a check to Bramow for \$10,010 and took the following receipt:

“Mortgage Bond and Guaranty Corporation.

January 20, 1927.

Second payment—First floor.....	\$11,000.00
Less Discount	560.00
	\$10,340.00
Less discount not deducted from first payment	330.00
	\$10,010.00

Inspected by Mr. A. P. Clark.

Received payment.

HARRY A. BRAMOW.”

Witness further testified that, under his direction, the paper writing dated January 25, 1927, from Bramow to Maiatico was prepared in his office, at the request of Mr. Bramow, and was delivered a day or so after January 25, 1927; that on February 1, 1927, receipt for \$10,340.00, being the third payment under the loan, was executed by B. Wolf and Harry A. Bramow; that this check was payable to the order of Jerry Maiatico; that by reason of a demand being made, and also by reason of an inspection of the progress of the work, witness knew that a payment of \$15,510.00 would soon be due, so he caused the check to be drawn about February 17, 1927, and also the receipt, but changed the date to March 1, 1927, when he delivered to Miss Wolf the check for \$15,510 payable to the order of Jerry Maiatico; that the check for \$15,510.00 was received by Bella Wolf; that

witness took her receipt therefor; that a few days thereafter plaintiff called at the office and indicated that he had some difficulty with Bramow; that plaintiff stated to witness that he was sorry that witness had delivered the check so that it came into Bramow's hands; that the Mortgage Company paid \$15,510.00 on that check; that witness showed plaintiff the receipt and had him approve it; that he never told plaintiff he was going to get the \$4000.00 difference from Bramow; that until the trial of plaintiff's case against the District National Bank plaintiff never said anything more about that \$4000.00 or made any demand for it, to the best of witness' recollection; that in August, 1927, he prepared and sent to plaintiff the statement wherein it was shown that there was a balance of \$30.64 due defendant Mortgage Company through the adjustment of fire insurance, which amount defendant received from plaintiff; that plaintiff did not claim at any time that defendant Mortgage Company withheld a discount, or made any demand for it, or for the \$4000.00 item; and that in July, 1928, at the time the foreclosure sale was in progress, unpaid taxes and interest were due; that, while the building was going up, they had frequent discussions about the revenue of the proposed building and made a survey of the neighborhood, which took place after the loan was made; that he had interviews with Bramow and Maiatico about changes in connection with

72 the apartment, partitions in the kitchen for dinettes, about beautifying the lobby and eliminating exposed heating pipes, and material to be used in the hallways and concerning changes in the stories; that he made six or seven trips to the Tax Office because they couldn't get a tax certificate and there were "some penny balances due;" that he spent about an hour to an hour and a half each time; that while the radiators were being placed in the apartments, he made a trip up to the building with Maiatico and also met the heating contractor with whom they had quite a discussion; that at the time this loan was made, defendant had two accounts, one in the Riggs National Bank and the other in the Federal American Bank, but that he did not know what the balances were but thought they were from thirty to fifty thousand dollars in each, with slightly less in the Federal Bank, but that the defendant Mortgage Company had

unlimited credit in both Banks and over a million dollars in negotiable first mortgage notes belonging to the defendant in its safe-deposit box. That, so far as this loan was concerned, there never was a time during the progress of the work when a demand for a payment was made and not immediately paid after inspection of the property.

On cross examination he testified that there had been no dispute about any of the checks being delivered to Bramow or Miss Wolf prior to the check for \$15,510.00, and the only dispute about that was as to its delivery to Miss Wolf, but not about the amount of the check; that Maiatico did not tell witness how much he had received from Bramow; that he did not ask plaintiff to approve the delivery of the checks to Miss Wolf; that he was notified, prior to February 1, 1927, that plaintiff was to receive all payments to be made under the loan; that he did not know that Miss Wolf was not employed by Maiatico, because Bramow and Maiatico had business relations together; that he did not make any investigation to find out what happened to the check for \$15,510.00; that at

73 the time witness and Maiatico discussed the matter of this check witness put the word "approved" on the receipt and Maiatico signed it; that he knew that Miss Wolf was employed by Bramow; that his Company had made two or three other loans to Bramow; that witness did not tell Maiatico the defendant Company was a forty-nine million dollar corporation and that he would see that plaintiff would get the \$4000 item; that the agreement to pay a commission of \$6600.00 was a part of the application for the construction loan made by Bramow; that before the property was advertised for sale in July 1928, witness had told plaintiff numerous times that the interest and taxes were past due, and that the defendant corporation was conducting the foreclosure sale because of past due interest and taxes. On re-direct examination witness testified that the Mortgage Bond and Guaranty Corporation consolidated with the Mortgage Security Corporation, which acquired the assets of the former by a re-issue of stock.

Whereupon **Vernon G. Owen** was called as a witness for the defendants and testified, in substance, that he was an auctioneer at all times in question, and that, under direction of the party secured, the property in question was adver-

tised by him for sale on July 9, 1928, the advertising and his fee amounting to \$115.30; that the sale was not conducted because of the injunction issued in this case; and that the expense in connection with the advertised sale of July 10, 1930 was \$126.50 for advertising and auctioneer's fee, and the expenses for the sale of October 17, 1930 amount- to \$95.20 for advertising and auctioneer's fee, and at the latter sale the property was sold by defendant trustees Kite and Hughes to one Lewis Barber for \$95,000.00, Barber ordering a title and purchasing the property for the defendant Mortgage Company. On cross examination he testified, that, although the terms of sale called for in the advertising were "1/3d of the purchase money to be paid in cash," and that a deposit of \$5000.00 would be required at the time of sale, that no money at all was received at the
74 sale or at any time and that the cash deposit was not received and no demand was made of Mr. Barber for the deposit of \$5000.00 because the trustees waived the deposit.

Whereupon **Louis Ottenberg**, attorney for defendants, testified for the defendants, over and above objection and exception of the plaintiff, which exception was allowed, in substance, as follows:

That about November 1930 he had paid \$20.49 for taxes on Lot 819, Square 2840, due for the second half of the year ending June 30, 1928, plus interest and penalty; also \$3002.26, taxes on Lot 820, Square 2840, for the year ending June 30, 1929, plus interest and penalty, for the non-payment of which taxes the property had been sold by the District at tax sale; also \$1381.86, taxes on Lot 820, Square 2840, for the first half of the tax year ending June 30, 1930, being the tax due in September 1929, plus interest and penalty; also \$1309.29, taxes on Lot 820 for the second half of the tax year ending June 30, 1931, being the taxes due in March 1930, plus penalty and interest; also \$1237.22, taxes due on Lot 820 for the first half of the tax year ending June 30, 1931, being the taxes due in September 1930, plus interest and penalty; that during the period covered by the said taxes the property was in the name of plaintiff; that the foreclosure sale had taken place October 17, 1930. Whereupon, the court asked the following questions:

“Q. The deed of trust gave you the right to pay the taxes, didn't it? A. Yes, sir. But we were enjoined from making any sale of the property.

Q. You were not enjoined from paying the taxes? A. Well, that is probably true.”

Witness further testified that he gave his personal check to the trustee defendants Kite and Hughes for \$4750.00, representing trustees' commission for said sale of 75 October 17, 1930, which \$4750.00 was part of the \$5000.00 one Battista had put up on July 10, 1930 when said trustee defendants had auctioned off said property for sale, said Battista failing to consummate the deal; that the trustee defendant Kite had been President of the defendant Mortgage Company before April 1927 and that trustee defendant Hughes had been a director of the defendant Mortgage Company before April 1927, but were not at the time of the auction sale.

Whereupon defendant rested.

Whereupon plaintiff took the stand in rebuttal, and testified, in substance, that he paid the taxes on November 21, 1929 on said property as follows:

Lot 812—1927 taxes, \$32.30, paid March 31, 1927; \$27.00, being second half taxes for 1927 on Lot 806 paid same date; on November 3, 1927 he paid \$15.66 for first half of 1928 taxes on Lot 819 and first half of 1928 taxes on Lot 806, \$36.13; on November 3, 1927, paid \$1168.58 first half 1928 taxes on Lot 812; on March 31, 1927 exhibited cancelled check payable to the order of Collector of Taxes for \$434.81, which, together with similar check for \$61.36 same date, representing second half 1927 taxes; paid taxes for said property in amount \$1199.76 by check dated November 2, 1927 and on December 16, 1927 by check for \$257.62, both of which were duly cashed by the Collector of Taxes, and on November 21, 1929, by similar check for \$1433.88 paid further taxes on said property; that he did not know that any taxes were in arrears in June, 1928, and that just prior to the foreclosure in July, 1928, he called upon Petit of the defendant Mortgage Company, while the property was being advertised, and Petit told him that he should pay the interest on the loan, “That is all it was;” and that Petit said nothing about taxes being due at that time.

On cross examination he testified that he had paid the taxes; that he thought he had paid all the taxes that were

76 due when the first advertisement of the property took place in July, 1928; that he went over to the Tax Office and then paid the taxes.

Whereupon the plaintiff asked leave of the court to have the Title Company officials testify that they considered there was a *lis pendens* on the title to this property at the time of the sale in July 1930, to Battista, and in October 1930, to Barber, and the court held this not necessary and accepted such proffer of such evidence, and held such evidence inadmissible over the objection and exception of the plaintiff, which exception was allowed by the court.

And Court certifies that the foregoing comprises the substance of all the testimony in the case necessary to explain the issues and questions involved and the relations of the parties thereto, and all of the proceedings in the trial of said issues, and that each and all of the exceptions so stated in the foregoing statement of evidence were duly noted and allowed by the Court and entered upon its minutes at the time the same were severally noted and taken; and the plaintiff then and there prayed the Court to sign this statement of evidence and the same in accordingly done and made a part of the record in this case, now for then, this 28th day of September, 1931, the plaintiff and defendant being in Court by counsel.

JESSE ADKINS,
Justice.

Approved.

GEORGE P. LEMM,
GEORGE P. LEMM, Esq.,
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Attorney for Plaintiff.*

LOUIS OTTENBERG,
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Endorsed on cover: District of Columbia Supreme Court. No. 5541. Jerry Maiatico, appellant, vs. Mortgage Security Corporation of America, successors, &c., et al. Court of Appeals, District of Columbia. Filed Nov. 4. 1931. Henry W. Hodges, Clerk.

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Henry W. Dodge

CLERK

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1931

No. 5541

JERRY MAIATICO, APPELLANT,

vs.

MORTGAGE SECURITY CORPORATION OF
AMERICA, ETC., ET AL., APPELLEES.

BRIEF FOR APPELLEES

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H. WINSHIP WHEATLEY, JR.,
Attorneys for Appellees.

*Refarm v Bank
12 Wallace*

INDEX.

SUBJECT INDEX.

	Page
Statement of facts.....	1
Argument	9
He who seeks equity must do equity.....	9
Taxes	15
The Battista transaction.....	18
Award of damages for wrongfully suing out injunction..	19
Assumption of mortgage by appellant.....	23
Conclusion	25

TABLE OF CASES CITED.

Annapolis Co. vs. Wardman, 59 App. D. C. 321-322.....	9
Brown vs. Swann, 10 Pet. 497.....	10
Chandler and Taylor Company v. Norwood, 14 App. D. C. 361.	23
Fanning vs. Dunham, 5 Johns Ch., 122, at 142.....	13
Local Union, etc., vs. Barker, 58 App. D. C. 51.....	19
McQuiddy vs. Ware, 20 Wall 14.....	10
Mollohan v. Masters, 45 App. D. C. 414.....	25
Stanley vs. Gadsby, 10 Pet. 521.....	12

OTHER CITATIONS.

D. C. Code, Sec. 1182.....	11
Section 479 B of the old Code, Title 3, Section 4 of new Code..	19
Section 479 A of the old Code and Title 3, Section 3 of the new Code	20

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BRIEF FOR APPELLEES

Statement of Facts

On December 9, 1926, Harry A. Bramow made a construction loan with the Mortgage Bond and Guaranty Company, the predecessor of the Mortgage Security Corporation of America, for the purpose of erecting the large apartment building located at 11th and Monroe Streets, N. W., and involved in this proceeding.

Bramow executed therefor a deed of trust for \$110,000.00 (Rec. 9-13, inclusive) and began building the apartment house.

On January 17, 1927, he deeded the property to the appellant, Jerry Maiatico, who assumed and agreed to pay said deed of trust (Rec. 14 and 15). The moneys were advanced as the work progressed and the total advances made under the trust amount to \$103,400.00 as will hereinafter appear. The first advance or payment was made on January 6, 1927, to Bramow and the other payments to Maiatico upon the written request of Bramow. These payments will be analyzed hereinafter in detail.

The interest on the trust was payable semi-annually at the rate of six and one-half per cent per annum (Rec. 10). The first interest installment was paid when due (Rec. 6). The second installment of interest was paid December 16, 1927, although due December 9, 1927. But the third installment was not paid at all. It was due June 9, 1928. Taxes were due in March, 1928 (Rec. 60). The appellant paid neither interest nor taxes, but on July 9, 1928 (Rec. 1), he filed his amended bill in the court below to enjoin the foreclosure sale begun by appellees under said deed of trust.

The third prayer of the bill is that the loan be declared usurious and the payment of principal not made and interest which had been paid be credited to the debt as provided in the Code of Laws for the District of Columbia. The eighth prayer of the bill is that the excess interest paid be credited to the amount justly

due to the defendants (Rec. 8). The reference to the Code of Law for the District of Columbia, doubtless, is to Section 1182 of the old code and Title 17, Section 5 of the new code. But this suit is neither an action at law brought upon the contract by the plaintiff as provided in the statute nor is it an action at law where the plaintiff might seek the application of a fixed rule without at the same time offering to do equity. *This suit is an action in equity wherein the plaintiff who seeks equity must do equity.* In his bill the plaintiff claims that the sum of \$6,600.00 was usury and says "this plaintiff agrees to repay the said amount actually advanced, after the crediting of the amount withheld by the Mortgage Security Corporation of America successors to the Mortgage Bond and Guaranty Corporation, as 'Discount' and the forfeiture of the amount of \$7,150.00, interest as is provided by the Code of Laws for the District of Columbia, and the amount not actually advanced, and the said 'Discount' and interest and the amount not actually advanced be deemed and taken to be payments made on account of the principal debt of one hundred and ten thousand dollars (\$110,000.00) and after crediting the said amounts this plaintiff agrees to repay the balance ascertained to be due the defendant" (Rec. 7).

The plaintiff's claim in substance, as appellees understand it, is that the interest which plaintiff had paid should be subtracted from the amount of principal which he and Bramow had received; also that he should be permitted to retain the full amount of principal received for the full term of the loan (five years from

December 9, 1926) without payment of any kind; also that the appellees should have paid the taxes and the court should have enjoined any foreclosure in the interval. His bill in this aspect seems to go even further and to claim a credit for the amount of the alleged discount on the amount of \$103,400.00 actually advanced. His bill says (Rec. 7) "this plaintiff agrees to pay the said amount actually advanced after crediting the amount withheld."

At the time that the plaintiff's amended bill was filed on July 9, 1928, the account between the parties with interest at six per cent per annum (not at six and one-half per cent per annum, the contract rate) from the time of the actual payment of the money to July 9, 1928, when the amended bill was filed, was as follows:

Amount Advanced	Date Advanced	Date of Filing Bill	Period of Time	Interest
\$5,500	1/ 6/27	to 7/9/28	1 Yr. 6 Mo. 3 Days	\$497.75
10,010	1/20/27	to 7/9/28	1 Yr. 5 Mo. 19 Days	882.54
10,340	2/ 1/27	to 7/9/28	1 Yr. 5 Mo. 9 Days	894.41
10,340	2/ 9/27	to 7/9/28	1 Yr. 5 Mo.	878.90
15,510	3/ 1/27	to 7/9/28	1 Yr. 4 Mo. 9 Days	1264.07 (Rec. 25)
10,340	3/16/27	to 7/9/28	1 Yr. 3 Mo. 24 Days	816.86
10,340	4/ 4/27	to 7/9/28	1 Yr. 3 Mo. 5 Days	784.11
10,340	4/19/27	to 7/9/28	1 Yr. 2 Mo. 21 Days	759.99
20,000	6/ 6/27	to 7/9/28	1 Yr. 1 Mo. 3 Days	1310.00
680	Insurance Adjustment as hereinafter shown.			
\$103,400 Total interest accrued				\$8,088.63

To this sum taxes are to be added as follows:

Total interest as above	\$8,088.63
(Rec. 60).	
Taxes (Rec. 60) Principal	\$36.13
Taxes (Rec. 60) Principal	1,145.67
Taxes (Rec. 60) Principal	15.35
Penalty (Rec. 60) Charged by District of Columbia	37.89
Total Taxes	\$1,235.04
Total	\$9,323.67
Credit Interest June 8, 1927 (Rec. 54)	\$3,575
Credit Interest Dec. 16, 1927 (Rec. 54)	3,575
Total	\$7,150
Balance due July 9, 1928	\$2,173.67

Insurance Adjustment above noted (Rec. 57):

Premium account Builders Risk	70.79
Premium account 5 year Policy:	
Mass. Fire and Marine Co. \$30,020	1,892.00
Surveyors Plat	15.00
Photographs	2.00
	\$1,980.79
Less credit account reduced rate on fire insurance policy	\$1,270.15
Credit payment by Maiatico	30.64
	1,300.79
Net payment, insurance adjustment	\$680.00

The appellant has included in his bill (Rec. 6) a calculation of interest which differs in figures but not in principle from that above stated. The court will find by observing the fifth column of plaintiff's tabulation that the calculation of the appellant is from the date of the various payments to January 1, 1928 and not to July 9, 1928 when the amended bill was filed, nor to July 6, 1928 when the original bill was filed, nor to June 6, 1928 when the interest was due. Notwithstanding this, plaintiff's tabulated statement shows that there was due according to his calculation after making all credits which he claimed, \$1,109.55 and in the statement at the bottom of the tabulation (Rec. 6) he recognizes his obligation to pay this interest as a condition precedent to sustaining his bill in equity although at no time was any such tender ever made by the actual offering of the money. His bill and brief in this Court are based on a conflicting theory that he is required to make no such payment. The figures while incorrect and misleading recognize one of the rules for which the appellees contend and upon which the court below decided the case, namely, that as a condition precedent to a decree in equity appellant was obliged to tender and pay the legal interest that was overdue.

There is an apparent though not real difference in the payment made under date of March 1, 1927 set forth in the tabulation hereinabove as \$15,510.00. This sum was paid by the Mortgage Company by check drawn to the order of Maiatico and the receipt thereof approved by him (Rec. 56-57). In the tabulated statement he included in his bill (Rec. 6) he carries this

item as \$11,510.00. His explanation (Rec. 54) was that he received \$11,510.00 out of the check and a judgment against the District National Bank for \$4,000.00.

The taxes that were due in March, 1928 were never paid by the appellant.

The provisions of the deed of trust with respect to taxes stripped of extraneous matter are as follows (Rec. 12):

“Upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises, or any part thereof, while this trust exists * * * or upon any default in payment on (or) demand of any sum or sums advanced by the holder or holders of said notes * * * on account of any such tax or assessment * * * with interest thereon at six per cent from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax or assessment, * * * the same may be paid by the holder or holders of said notes and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the parties hereto of the second part, * * * shall sell the aforesaid land and premises and improvements at public auction * * *.”

The court below found (Rec. 43; Finding 10) that the plaintiff did not pay or tender payment of taxes overdue on July 9, 1928, and that it was the duty of the plaintiff to pay these taxes without demand (Rec. 42; Finding 7). It is respectfully submitted that the evidence substantiates these findings.

This cause has heretofore been to this Court on a motion to dismiss plaintiff's bill. In *Maiatico vs. Mortgage Security Corporation*, 59 App. D. C. 21, this Court held that, as against said motion, the allegations of the bill were sufficient to show the substitution of plaintiff for Bramow and, therefore, notwithstanding that he had assumed and agreed to pay the mortgage he could still question it. The evidence submitted by the plaintiff in support of this averment (Rec. 53 and 54) is the following letter from Bramow to the Mortgage Company requesting that future payments be made to the plaintiff subject to the conditions of the loan "same remaining in full force."

"WASHINGTON, D. C., January 25, 1927.

Mortgage Bond & Guaranty Corp'n,
Washington, D. C.

GENTLEMEN:

This is to advise you that I have sold Eleventh and Monroe Streets, N. W., known as Lots 804-5-6-7, Square 2840, now in the course of construction, to Jerry Maiatico.

In connection with the balance remaining due account of the construction loan, I hereby request that all future payments be made to Jerry Maiatico, subject to all of the terms and conditions of the loan as agreed by you, same remaining in full force.

Yours very truly,

HARRY A. BRAMOW.

Witness:

WM. P. STORM.

Accepted.

JERRY MAIATICO."

ARGUMENT

He Who Seeks Equity Must Do Equity

The rule in equity, it is respectfully submitted, in cases like that at bar, is that he who seeks equity must do equity. Applying this principle to cases involving usury, the courts have uniformly held that before the plaintiff shall be entitled to any relief in equity he must repay the principal sum actually received together with lawful interest thereon. This the appellant has never done. He has filed his bill in equity, but invokes the rule at law. As shown by the authorities hereinafter cited, the principles in equity are different from those applied at law.

The plaintiff in his bill claims that his grantor (Bramow) had agreed to pay usury; that plaintiff had paid interest on such transaction; therefore, said interest should be credited on the principal of the trust (Rec. 7).

The appellees submit that while this may be the rule at law, it is not the principle applicable to cases in equity and the case at bar is a case in equity.

The appellant has invoked the jurisdiction of an equity court to prevent a foreclosure. He, therefore, submits himself to the equitable principle that "he who seeks equity must do equity."

In the case of *Annapolis Co. vs. Wardman*, 59 App. D. C. 321-322, this Court says:

"He who seeks equity must do equity. The usual illustration of this maxim is the case of

a borrower of money on usurious interest, who comes into a court of equity to ask for relief by having the transaction set aside. Equity will not afford him redress except upon the terms of his returning the amount actually borrowed with lawful interest, because it is as equitable that the person who has loaned the money should have the amount with lawful interest returned to him, as that the borrower should be relieved from his unjust obligation to pay a usurious rate. So also a mortgagor who files a bill to redeem, must offer to do equity by paying the mortgagee his debt, interest and costs." (Italics supplied.)

Certiorari was denied in 282 U. S. 867.

The case of *McQuiddy vs. Ware*, 20 Wall. 14, is cited by the court in the *Annapolis Co. vs. Wardman* case, above quoted, and from this case the following excerpt is taken:

"Apart from all this, the maxim that he who seeks equity must do equity in the transaction in respect to which relief is sought, has not been observed by this complainant. While admitting his indebtedness, and that it has existed for ten years or more, he does not make a tender in court of what is justly due, although he is asking the court to set aside the proceedings by which this indebtedness was satisfied, on the ground of their absolute nullity. The willingness to pay what is found to be due on the adjustment of the accounts for rents and profits is not the sort of offer required of a person in the situation of this complainant."

The case of *Brown vs. Swann*, 10 Pet. 497, went to the Supreme Court of the United States from this Dis-

strict and presented a situation very analogous to the case at bar. The Virginia statute (page 501) then in force in Alexandria County, District of Columbia, provided, that if more than lawful interest was reserved, the lender should be obliged to accept the principal money without interest or consideration. (Compare D. C. Code, Sec. 1182.) The plaintiffs filed their bill to enjoin execution on a judgment and alleged in the bill (p. 499):

“Your oratrix and orator have been advised that they are bound, in a court of equity, to pay nothing more than the principal debt, and that they are entitled to have credit for the moneys which she has paid, to be deducted out of the sum of \$2,300, loaned as aforesaid, and only bound to pay the balance of principal, after such deduction shall have been made.”

The court in disposing of this question said (p. 503):

“Unless a statute, then, in so many words, or by an inference which does not admit of a doubt, commands the courts of equity in Virginia to give relief from usurious contracts, by evidence *aliunde*, without requiring the borrower to pay principal and interest, the law should not be so construed. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.

“But the section under review should have a strict construction as to the relief intended to be given by it to a borrower; because it is not a law in furtherance of strict justice between the borrower and lender. The former

has by it, upon the discovery of the usury by the lender, the use of the money without paying the interest fixed by the law as a fair compensation for the loan of money. *Strict justice requires from the party claiming to be released by equity, that he should do equity; and in cases of usury, relief has heretofore only been given upon the payment of principal and interest.*" (Italics supplied.)

With respect to the forfeiture of interest, the averments of the bill in the Swann case seem strangely similar to the averments of the bill in the case at bar (Rec. 7).

In *Stanley vs. Gadsby*, 10 Pet. 521, the court in passing upon a similar proposition said (page 522):

"This, then, is substantially an application for relief from usury; and the consequence of granting the injunction would be relief upon terms at variance with the rule of equity, so fully recognized at this term of the court, in the case of *Brown vs. Swan, et al.*, that *he who seeks the aid of equity, to be relieved from usury, must do equity by paying the principal and legal interest upon the money borrowed.* The complainant does not offer to do so in his bill. This is essential to every such application in a court of equity, first, to give the court jurisdiction, and to enable the Chancellor, if he thinks proper to do so, to require the payment of principal and interest before the hearing of the cause. The relief sought in such cases is an exemption from the illegal usury. The whole inquiry on the hearing is to establish that fact, and to give relief to that extent. Whenever,

then, a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity.” (Italics supplied.)

In *Fanning vs. Dunham*, 5 Johns Ch., 122, at 142, Chancellor Kent said:

“With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him * * * It is perfectly immaterial, in respect to the application of the principle to the case of the debtor who sues here (in equity), whether the usury be confessed by the defendant in his answer or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his defense at law, as well as he can.”

The Chancellor also says (p. 143):

“In *Scott vs. Nesbit* (2 Bro. 641, 2 Cox 183), we have this strong observation of Lord Thurlow:

“‘I take it to be an universal rule, that if it be necessary for you to come into this Court to displace a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any

other terms.' He directed, in that case, that the judgment should stand as a security for the money actually paid, with legal interest.

"The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is a fundamental doctrine of the Court. Lord Hardwicke (1 Vasey, 320), said, that *in case of usury, equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due*. Lord Eldon (3 Ves. & Bea. 14), after an interval of more than sixty years, declared precisely the same rule. 'At law,' says he, 'you must make out the charge of usury, and at equity, you cannot come for relief, without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party.' In *Eagleson vs. Shotwell* (1 Johns. Ch. Rep. 536), the same rule was followed in this Court, where a party came to be relieved against usury in a mortgage * * *"

"*It is sufficient for the purposes of public justice, and public policy, that the law has enabled a debtor, in every case, in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his obligation to pay even what was received, and that in all cases he can, by paying the actual principal received, and the lawful interest, be relieved from the usurious exaction.*" (Italics supplied.)

The cases cited above were all equity cases, involving equitable principles. The case at bar is such an

equity case. The cases cited in appellant's brief were law suits. This is one of the cardinal differences between the contention of appellant and appellees in this case, and establishes the inapplicability of the principles contended for by the appellant.

Taxes

The taxes, due in March, 1928, amounted to \$1,-235.04, when the bill was filed in July, 1928 (Rec. 60). The plaintiff did not pay them. On July 10, 1930 (Rec. 60), more than two years after said taxes were overdue, and after the court had dissolved plaintiff's temporary injunction (Rec. 40-41) and on the very day of the foreclosure sale under the advertisement, plaintiff claims to have taken an uncertain sum of money (Rec. 56) to the office of the attorney for the mortgagee and not finding him in went to the office of one of the trustees who was also out. Plaintiff did not attend the sale although he had been informed that appellees' attorney would be at the sale. Plaintiff never made any further attempt to make tender nor did he pay the taxes (Rec. 60-61). The sale of the property made July 10, 1930, was not consummated by the purchaser and it was not until October 17, 1930 (Rec. 65), that the property was sold by the trustees. As a result of that sale and in the settlement therefor appellees paid the taxes. During all the time that the taxes were overdue, that is from March, 1928, until October, 1930, the appellant retained title to and possession of said property and received all of the income from this large apartment house, but, nevertheless,

permitted taxes to accumulate and permitted the property to be sold for taxes (Rec. 35) although in May, 1930, appellant stated under oath (Rec. 38) that "this plaintiff is not informed as to the amount of taxes unpaid, but will make inquiries and pay the taxes due and unpaid." The plaintiff admitted that he was "receiving the rents due from said apartment house" (Rec. 38).

The deed of trust authorized a foreclosure sale (1) if the mortgagor defaulted in the payment of taxes or (2) if the mortgagor failed to pay to the mortgagee taxes paid by the mortgagee (Rec. 12). There is no question that the appellant who had assumed and agreed to pay said mortgage, had failed to pay the taxes, nor had the mortgagee paid the same up to the time of the sale of the property, which sale was more than two years after the institution of these proceedings. And from July 9, 1928 (Rec. 15), until June 27, 1930 (Rec. 40), appellees had been enjoined by the court from making sale of the property or in any way interfering with the possession of the plaintiff (Rec. 20).

As the appellees understand the argument made on behalf of the appellant it is that under Section 1182 of the old code, Title 17, Section 5 of the new code, the payments of interest made by the appellant should be deemed and taken to be payments on account of the principal debt, and applied in reduction thereof. At the same time he contends that this same interest money should be used for the payment of taxes (Appellant's brief 16). This would clearly indicate that

the appellant seeks a double application of the same money. His position is therefore inconsistent. Appellant further contends that the principal of the loan should be reduced by the alleged discount charged, and at the same time he contends that this same discount should have been used to pay the taxes. Again, it is respectfully submitted, he is seeking a double application of the same money. But appellant cites no cases to support either of the foregoing contentions made by him. His position, it is respectfully submitted, is not consonant with either the legal or the equitable remedy nor is his position a fair one in that, after he had enjoined the appellees, he continued to receive the rents from a large apartment house and still permitted all taxes to accumulate and remain unpaid.

In brief, it would appear that appellant claims that because there may have been usury in this deed of trust loan, he can take all of the rents from the property, have the use of the mortgagee's money for the full term of the loan, to wit, five years, pay no interest and pay no taxes and, nevertheless, enjoin the foreclosure under the deed of trust for a default specifically provided for in the deed of trust. If his argument is carried to its logical conclusion, it would mean that he may also neglect insurance and repairs and suffer depreciation and at the end of the five-year period abandon the property after having reaped the gains during that term of years. Can an equity court be asked to lend its aid to such an unconscionable proposition?

The Battista Transaction

The facts with reference to the Battista transaction briefly are these: After Maiatico had failed to comply with the order passed in this cause on May 27, 1930 (Rec. 40-41), and failed to keep good his tender (Rec. 40) by paying the amount admitted by him to have been received from the defendant mortgage company, the temporary injunction theretofore passed was dissolved and thereupon the trustees under the Bramow deed of trust foreclosed on the property. At that foreclosure sale one Battista was the highest bidder and made a deposit with the trustees of \$5,000.00, but he failed to consummate the sale and the trustees declared his deposit forfeited. Battista filed his bill in equity in the court below for an order restraining the trustees from proceeding with the re-sale of the property; for specific performance of the contract; and in the event the court should find the trustees could not convey a good title, that they be required to refund the \$5,000.00 deposit and for damages. That case was decided by this Court April 4, 1932 (Number 5375 of this Court), in which the court held that the bill was good against the motion to dismiss and remanded the cause for further proceedings. The Battista suit was pending and undisposed of in this Court at the time of the trial of the Maiatico case in the trial court. It was impossible therefor for the trial justice to make any disposition of the Battista deposit of \$5,000.00 until the Battista litigation was finally disposed of. The record is silent as to any claim made by the plaintiff to this \$5,000.00 except in

his amended assignment of error filed August 25, 1931 (Rec. 49), although the final decree in this cause had been signed June 26, 1931 (Rec. 47). The claim of this appellant is not only belated but double, in that he seeks an application of funds that were also claimed by Battista, a fund then and now in litigation.

It will, therefore, be seen how unjust and inequitable the position of the appellant is when he says in his brief (page 22) "As usual, defendants will neither return to the purchaser nor give credit to plaintiff therefor—moneys which they received without giving anything in return."

Award of Damages for Wrongfully Suing Out Injunction.

Section 479 B of the old code, Title 3, Section 4 of the new code provides:

"In any proceeding in the Supreme Court of the District of Columbia or any special term thereof to recover damages upon a bond or undertaking given to obtain a restraining order or preliminary or *pendente lite* injunction the court, in assessing damages to be recovered thereunder, may include such reasonable counsel or attorney fees as the party aggrieved or damaged by such restraining order or injunction may have been put to or incurred in obtaining a dissolution thereof."

This Court held in *Local Union, etc., vs. Barker*, 58 App. D. C. 51, quotation from page 53 as follows:

"We are of the opinion that the language of the act and the weight of authority in analogous

cases justify the conclusion that the attorney fees incurred by defendants in the trial of the cause below, whereby the injunction *pendente lite* was terminated or dissolved, are recoverable as damages upon the injunction bond; for without such a trial the injunction would have continued in force, and the restrictions wrongfully imposed upon defendants by it would actually have become permanent."

Notwithstanding the force of the statute and the opinion of this Court, appellant complains of the attorney's fees allowed by the trial court below (Appellant's brief, page 25), and says that the allowance would be a deterrent against the assertion of equitable rights. The obvious answer is, first, that the statute and this Court have both authorized it; and, second, that this defendant ought not to be required to pay its counsel fees to obtain the dissolution of an injunction sued out wrongfully and in contravention of the plainest principles of equity.

The statute applicable to the allowance of damages with reference to interest and taxes is Section 479 A of the old code and Title 3, Section 3 of the new code. Omitting immaterial matter, it reads as follows:

"In all cases, where, * * * a bond is required from any party to a cause or proceeding pending in such court, such bond shall be in the form of an undertaking, under seal, in a maximum amount to be fixed by the court, conditioned as required by law, the surety or sureties therein submitting themselves to the jurisdiction of the court and undertaking for themselves and each of them, * * * to abide by

and perform the judgment or decree of the court in the premises, and further agreeing that, upon default by the principal in any of the conditions thereof, the damages may be ascertained in such manner as the court shall direct; that the court may give judgment thereon in favor of any person thereby aggrieved against such principal and sureties for the damages suffered or sustained by such aggrieved party, and that such judgment may be rendered in said cause or proceeding against all or any of the parties whose names are thereto signed.”

When the plaintiff filed this suit and obtained the temporary restraining order he gave an undertaking (Rec. 17) in the penalty of \$10,000.00 under this statute. The injunction was continued pending the appeal and he was required to give a supersedeas undertaking. This restraining order bound the defendant from July 9, 1928, when it was issued (Rec. 15). After the return of the case from this Court on the first appeal the defendant filed its answer (Rec. 21). At that time the only undertaking was the one for \$10,000.00 above named and the defendant (Rec. 28) prayed that it might have and recover from the principal and the sureties on the undertaking, damages not exceeding \$10,000.00 suffered by the defendant. It is this clause that appellant contends (Appellant's brief, page 23) was tantamount to the *ad damnum* clause of a declaration and limits the defendant's recovery. It is respectfully submitted that such argument is fallacious.

There is no requirement in the statute quoted above that one should claim the amount of damages by way of a cross bill. The mere dissolution of the injunction would authorize the court to assess the damages against both principal and surety in such manner as the court shall direct for "the damages suffered or sustained by such aggrieved party."

Subsequently, and after the filing of the answer, the plaintiff was required as a condition for continuing the injunction to give an additional undertaking in the penal sum of \$15,000.00, which he did (Rec. 34). The injunction was not dissolved until June 27, 1930 (Rec. 40-41).

The effect of the appellant's argument here would be that the second undertaking gave no protection whatsoever to the appellee because its answer stated its damages to be \$10,000.00 as of the time it was filed. Notwithstanding, the plaintiff afterwards was required to give a \$15,000.00 bond, appellee's damages have been actually proved (Rec. 44-46).

The damages which the defendant suffered were interest on \$103,400.00 from July 9, 1928, when the temporary restraining order was issued, to June 27, 1930, when the injunction was dissolved, amounting to \$12,-201.20; and the sum of \$5,289.07 accrued taxes from September, 1928, to June 27, 1930, with adjusted penalty thereon. Also the attorney's fees above mentioned.

It is respectfully submitted that it is not necessary for the defendant's pleadings to make any specific claim for such damages because it follows as a result

of the wrongfully suing out of the injunction. It is not the equivalent of a claim made in a declaration or on a plea of set-off or on a cross-bill. It does not go to the merits of the defense but is an incident arising from the wrongful suing out of the writ by operation of law.

Furthermore, the appellant did not specifically raise the point in the court below. The matter was not presented to the trial court for decision, nor was there any alleged limitation of the amount of damages recoverable mentioned.

Chandler and Taylor Company v. Norwood, 14 App. D. C., 361.

Assumption of Mortgage by Appellant

It will be recalled that Bramow originally owned the property involved in this proceeding and made the mortgage here under consideration. The first payment under the construction loan was made by the mortgage company to Bramow. Thereafter, Bramow conveyed the property to the appellant by deed dated January 17, 1927, and by said deed of conveyance, accepted by the appellant, he assumed and agreed to pay the mortgage debt (Rec. 14-15). Thereafter, Bramow wrote a letter to the mortgage company dated January 25, 1928 (Rec. 53-54), advising the mortgage company that he had sold to appellant the property, then in course of construction, and requested that all future payments, in connection with the balance remaining due on account of the construction loan, be made to Maiatico, subject to all of the terms and conditions of the mortgage remaining in full force.

This letter and the receipt of said payments by Maiatico constituted the only evidence offered by the plaintiff in support of his contention that he had been substituted for Bramow in the transaction so as to permit him to challenge the loan. This Court had held on the former appeal (59 App. D. C. 21) that, on demurrer, plaintiff's bill on its face had stated facts sufficient to make out a case of substitution.

There is no desire on the part of the appellee to reargue a question that has been decided by this Court. It merely wishes to show the failure of the testimony offered on behalf of the appellant to support the bill.

This Court, on said former appeal, said at page 22,

“We are of the opinion that the foregoing allegations, which are admitted to be true for the purposes of the motion to dismiss the bill, are sufficient to entitle the plaintiff to equitable relief against the defendant. *It is true that this cannot be said if the plaintiff be regarded only as the grantee of the premises under Bramow's deed whereby plaintiff assumed to pay the mortgage indebtedness, nor if plaintiff be regarded only as the guarantor of the bond given by Bramow to the corporation for the completion of the building according to the plans and specifications. But equity regards the substance and intent rather than the form of a transaction, and the bill of complaint filed below is sufficient to show that the plaintiff should not be regarded in equity as merely the grantee or guarantor of Bramow.*” (Italics supplied.)

The appellee leaves to this Court the application of the facts to plaintiff's amended bill of complaint and

concludes this phase of the brief by bringing to the attention of the Court its decision in the case of *Mollohan v. Masters*, 45 App. D. C. 414, in which this Court says at page 420:

“A purchaser of a mere equity of redemption in real estate, as in this case, is in such privity of estate or contract with the mortgagor and grantor as to enable him to plead usury. The ruling is different where the sale is for a given amount and *indebtedness is assumed as part payment*. In such a case, to permit the plea of usury to reduce the encumbrance would amount to a reduction of the agreed purchase price and the making of a new contract for the parties.”

Conclusion

It is respectfully submitted that the appellant is seeking an unconscionable advantage, while the equities favor the mortgagee. Not only did the appellant use the mortgagee's funds with which to erect the large apartment building involved in this case, and not only did he derive all of the income from that building, but he permitted the taxes to become overdue and unpaid and he also refused to pay the interest on the deed of trust indebtedness. He seeks equity, but refuses to do equity. In his bill, he made a pretended tender of the moneys due to the mortgagee, but when called upon to make that tender good, he wholly failed and refused to do so, as is particularly evidenced by his failure to comply with the order of May 27, 1930 (Rec. 40-41). He has never paid or offered to pay the amount actu-

ally received and the lawful interest due thereon, which, all of the authorities say, it is respectfully submitted, is a prerequisite to equitable relief. He has contented himself with a hue and cry of usury, and, while attempting to point out the mote in the eye of the mortgagee, fails to see the beam in his own eye. He asks this Court to aid him in doing an injustice in the guise of correcting what he calls usury. Whatever the appellee may have done with respect to charging an alleged bonus on this construction loan, nevertheless the appellee is not to be outlawed or deprived of equitable rights. Appellee asks this Court to see that the appellant who seeks equity, does equity. It respectfully submits that it would be unconscionable to allow the appellant to have the fruits and profits of an apartment house under a five year loan and pay neither interest or taxes; that it would be unjust to allow him, after an unquestioned default, to enjoin a sale from July of 1928 to June of 1930, and yet avoid the consequent damages. That it would be inequitable to allow him to claim the Battista fund and at the same time require the appellee to answer to Battista for it. In the instances where the appellant has asked for a double application of the fund he can only do so by the plainest of legal casuistry.

It is respectfully submitted that the decree below was right and should be affirmed.

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(1947)

